

N. 7809  
No. 13490

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United States  
Court of Appeals  
for the Ninth Circuit.

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ROSCOE FOWLER,

Appellant,

vs.

VIMCAR SALES COMPANY, a Corporation,  
VICTOR M. CARTER and MORRIS J.  
HALOPOFF,

Appellees.

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Transcript of Record  
In Two Volumes  
Volume I  
(Pages 1 to 352)

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

MAR 28 1953



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles, Calif.



In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 13002-HW

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, VICTOR M.  
CARTER and MORRIS J. HALOPOFF,

Defendants.

COMPLAINT FOR INFRINGEMENT OF U. S.  
PATENT No. 2,516,196 AND FOR UNFAIR  
COMPETITION

Plaintiff Complains of Defendants, and for Cause  
of Action Alleges:

1.

This cause of action arises under the patent laws  
of the United States of America and this Court has  
jurisdiction thereof under 28 U.S.C. 1338(a).

2.

Plaintiff is a citizen of the State of California,  
and resides in Los Angeles County in the Southern  
Judicial District of California.

3.

The defendant, Vimcar Sales Company, is a cor-  
poration duly organized and existing under and by  
virtue of the laws of the State of [2\*] California,

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\*Page numbering appearing at foot of page of original Certified  
Transcript of Record.

has a regular and established place of business and is doing business in Los Angeles County in the Southern Judicial District of California.

## 4.

The defendants Victor M. Carter and Morris J. Halopoff reside and have regular and established places of business in Los Angeles County, in the Southern Judicial District of California.

## 5.

On July 25, 1950, United States Letters Patent No. 2,516,196 were duly and legally issued to plaintiff for Adjustable Overhead Door Hinge and since that date plaintiff has been and still is the owner of said Letters Patent and of all rights to sue for past and present infringements thereof.

## 6.

The defendants and each of them have jointly and severally, wilfully and wantonly infringed and still are infringing said Letters Patent by making, using and selling, and causing to be made, used and sold, in the Southern Judicial District of California and elsewhere in the United States, Overhead Door Hardware including Adjustable Overhead Door Hinges embodying the inventions described and claimed in said patent and said defendants threaten to and will continue to infringe said patent unless enjoined by this Court. Plaintiff has suffered great and irreparable damage by said infringements and will continue to be damaged thereby unless the defendants are enjoined by this Court.

7.

The defendant Victor M. Carter is a director of the corporate defendant Vimcar Sales Company and is the president, manager and [3] principal stockholder of said corporation, and has personally instigated and directed the infringements committed by the defendant Vimcar Sales Company. The defendants, and each of them, have had personal knowledge of the infringements herein complained of and have wilfully and wantonly aided, abetted and conspired with each other to infringe said Letters Patent and to render the same valueless.

8.

The defendants have been notified in writing of their infringement of said patent aforesaid.

For a Second and Separate Cause of Action, Plaintiff Alleges:

9.

This cause of action is for unfair competition and this Court has jurisdiction thereof under 28 U.S.C. 1338(b), and 15 U.S.C. 1121, 1126(h) and (i).

10.

Plaintiff repleads and incorporates herein by reference paragraphs 2 to 8, inclusive, of his First Cause of Action.

11.

Plaintiff is engaged in the business of manufacturing and selling in commerce among the several states of the United States and which may lawfully be regulated by Congress, overhead garage door

hardware including adjustable overhead door hinges as disclosed and claimed in plaintiff's patent No. 2,516,196.

## 12.

The defendants Vimcar Sales Company and Victor M. Carter were formerly customers of plaintiff and purchased substantial quantities [4] of said overhead hardware from plaintiff, in the course of which dealings and at the specific instance and request of said defendants, plaintiff furnished to said defendants complete information as to said products and their manufacture and also various advertising materials including photos, cuts, drawings and printed literature which defendants used in merchandising said products purchased by them from plaintiff.

## 13.

During the time that defendants Vimcar Sales Company and Victor M. Carter were customers of plaintiff and thereafter, said defendants conspired with each other and with the defendant Morris J. Halopoff to unfairly compete with plaintiff by manufacturing and selling products which were substantial duplicates in all respects of said products manufactured by plaintiff under his said patent and to copy and appropriate plaintiff's said advertising materials, with the intent and for the purpose of confusing the buying public and causing purchasers and prospective purchasers to believe that defendants' goods were manufactured by plaintiff.



## 14.

Pursuant to said conspiracy, the defendants have wilfully and wantonly used in commerce that may be lawfully regulated by Congress and without the consent of plaintiff, reproductions, counterfeits, copies and colorable imitations of plaintiff's said products and advertising materials and have used the same in connection with the sale, offering for sale, and advertising of said products, which use is likely to cause confusion, mistake and deception of purchasers as to the source of origin of said goods, all of which acts constitute unfair trade practices and unfair competition with plaintiff. [5]

## 15.

That the acts of unfair competition above complained of have in fact caused confusion, mistake and deception of customers and others in the trade and enabled defendants to palm off their goods as those of plaintiff, and by reason of said unfair acts of defendants and said palming off, the defendants have made substantial profits and have been unjustly enriched thereby and plaintiff has been seriously damaged and will continue to be damaged unless defendants are restrained by this Court from continuing their said acts of unfair competition.

Wherefore, plaintiff prays for a preliminary and final injunction against further infringement of said patent, and against further acts of unfair competition by defendants, their officers, agents, employees, attorneys and those controlled by or associated or in active concert with them; for an

accounting for profits and damages for said infringements and acts of unfair competition; that the amount of said damages be trebled; for his costs and attorneys fees incurred in this action; and for such other and further relief as this Court shall deem just and proper.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By /s/ ROBT. W. FULWIDER,  
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed April 5, 1951. [6]

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[Title of District Court and Cause.]

### ANSWER

Defendants, Vimcar Sales Company, Victor M. Carter, and Morris J. Halopoff, for their answer to the Complaint of plaintiff, Roscoe Fowler, aver as follows:

1.

Defendants admit that this cause of action arises under the patent laws of the United States of America and that this court has jurisdiction thereof.

2.

Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegation contained in paragraph 2 of the Complaint and therefore deny it.



3.

Defendant, Vimcar Sales Company, admits that it is a corporation duly organized and existing under and by virtue of [8] the laws of the State of California and that it has a regular and established place of business and is doing business in Los Angeles County in the Southern Judicial District of California.

4.

Defendants, Victor M. Carter and Morris J. Halopoff, admit that they reside in and have regular and established places of business in Los Angeles County.

5.

Defendants, and each of them, deny each and all of the allegations of paragraph 5 of the Complaint.

6.

Defendants, and each of them, deny each and all of the allegations in paragraph 6 of the Complaint.

7.

With respect to allegation No. 7 of the Complaint, Defendant, Victor M. Carter, admits that he is a director of the corporate defendant, Vimcar Sales Company, and that he is the president, manager and principal stockholder of said corporation. With respect to all of the remaining allegations of paragraph 7 of the Complaint, Defendants, and each of them, deny them.

## 8.

Defendants, Vimcar Sales Company, and Victor M. Carter, admit receiving notice in writing of infringement of the patent in suit. Defendant, Morris J. Halopoff, denies receiving notice of any kind of infringement of the patent in suit.

## 9.

Defendants admit general jurisdiction of this court over unfair competition matters when related to patent infringement but deny that there is here a cause of action for unfair competition. [9]

## 10.

With respect to allegation 10 of the second and separate cause of action, Defendants incorporate in this allegation the same answers heretofore made to allegations of paragraphs 2 to 8, inclusive, of the first cause of action.

## 11.

Defendants are without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 11 of the Complaint and therefore deny them.

## 12.

With respect to paragraph 12, Defendants, Vimcar Sales Company and Victor M. Carter, admit that they were formerly customers of the Plaintiff and that they purchased quantities of overhead door hardware from the Plaintiff, but as to each and all of the remaining allegations of paragraph 12, Defendants deny them.

13.

Defendants, and each of them, deny each and all of the allegations of paragraph 13 of the Complaint.

14.

Defendants, and each of them, deny each and all of the allegations of Paragraph 14 of the Complaint.

15.

Defendants, and each of them, deny each and all of the allegations of paragraph 15 of the Complaint.

As a Further and Affirmative Defense to Said Complaint Defendants Aver:

16.

That on information and belief U. S. Patent No. 2,516,196 is invalid and void for the reason that the alleged invention thereof attempted to be patented therein, and every material and substantial part thereof had long prior to the alleged invention or [10] discovery thereof by Roscoe Fowler or more than one year prior to the filing of the application for said patent in suit, been patented, described and contained in patents numbered and dated as follows:

Soucek, et al.....	951,344
Wentworth .....	1,177,749
Mize .....	1,942,720
Guth .....	2,162,381
Ferris .....	2,164,648
Wolf .....	2,166,898

Ferris .....	2,170,295
Holmes .....	2,228,314
Peck .....	2,233,638
Holmes .....	2,259,819
D'Autremont .....	2,347,770
Wread .....	2,441,742

## 17.

That on information and belief said Roscoe Fowler was not the original, first and true inventor of the alleged inventions purported to be covered by said patent in suit No. 2,516,196, or of any material or substantial part thereof but that the same were disclosed prior to the alleged invention thereof or more than one year prior to the filing by said Roscoe Fowler of the application for said patent in suit in printed publications and among others in the specifications and drawings of said patents recited in [11] paragraph 16 hereof and also in printed publications and advertising literature of Sturdee Steel Products Company, presently located at 6820 Brynhurst Avenue, Los Angeles 43, California.

## 18.

That on information and belief Roscoe Fowler was not the original or first inventor or discoverer of any material or substantial part of the things included in said patent and that the same involved merely the exercise of mechanical skill and judgment in view of common knowledge and practice in the art long prior to Roscoe Fowler's alleged in-

ventions or more than one year prior to his application for said patent in suit.

## 19.

That on information and belief said patent in suit No. 2,516,196 is invalid and void for the reason that the alleged invention thereof and all of material and substantial parts thereof were invented by others, known to others, used by others or were in public use or on sale in the United States by persons or corporations, and employees and officers thereof prior to the alleged inventions by said Roscoe Fowler or more than one year prior to the filing of applications for said United States patent in suit No. 2,516,196, including, among others:

Tavart Company, Ltd., presently located at 15134 South Orizaba Avenue, Paramount, California;

Cliff Saint, Barkersfield Sand, Stone and Gravel Company, 315 East 18th Street, Bakersfield, California;

Roscoe Fowler, 6820 Brynhurst Avenue, Los Angeles 43, California. [12]

## 20.

That on information and belief in view of the knowledge and practice of the art at and long prior to the dates of filing of applications for said patent in suit No. 2,516,196, there was required no invention whatsoever but only the ordinary skill of the art to which said alleged invention appertains and that said patent is consequently invalid and void.



## 21.

That, on information and belief, said patent in suit No. 2,516,196 does not describe the alleged invention as required by law in such full, clear, and exact terms as to enable any persons skilled in the art or science to which they appertain to make, employ, or use the same and does not point out and distinctly claim the parts or improvements claimed as the patentee's alleged invention as required by law and is therefore invalid.

## 22.

That on information and belief the disclosure of said patent No. 2,516,196 is inaccurate, misdescriptive and erroneous and was written to intentionally confuse and deceive the Examiner and to secure the issue of a patent which is not truly portrayed in the description as required by law and the patent is therefore invalid.

## 23.

That Defendants have been diligent in ascertaining and setting forth herein instances of prior knowledge, invention, use, publication and patenting of the alleged invention of patent in suit No. 2,516,196 and believing many further instances to exist, Defendants pray leave to add the same by amendment or otherwise when ascertained. [13]

Wherefore Defendants Pray:

1. That the patent in suit be declared invalid.
2. That the patent in suit be declared not infringed.

3. That the Complaint be dismissed with respect to the Defendants with prejudice.

4. That the second cause of action directed to unfair competition be dismissed with respect to the Defendants with prejudice.

5. That the Defendants be awarded attorneys' fees.

6. That the Defendants be awarded damages, costs and such other and further relief as may in justice be required.

Dated: May 18, 1951.

[Seal]                   VIMCAR SALES COMPANY,

By /s/ VICTOR M. CARTER,  
                                  President.

/s/ VICTOR M. CARTER,

/s/ MORRIS J. HALOPOFF,

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 21, 1951. [14]

[Title of District Court and Cause.]

CIVIL SUBPOENA TO PRODUCE  
DOCUMENT OR OBJECT

To Roscoe Fowler:

You Are Hereby Commanded to appear at the office of Huebner, Beehler, Worrel & Herzig, at 610 South Broadway, Room 410, in the city of Los Angeles, on the 30th day of August, 1951, at 10:00 o'clock a.m. pursuant to notice heretofore served upon you requiring your attendance at a deposition to be taken on that day in connection with the above-entitled action and bring with you all books and records pertaining to the design, construction, manufacture and sale of overhead door hardware since said Roscoe Fowler has entered into the manufacture thereof, including especially blueprints and specifications relating to overhead door hardware identified currently as "jamb hardware" having a structure substantially similar to that illustrated in Fowler, et al., Patents Nos. 2,523,207 and 2,516,196 in products identified by plaintiff as De Luxe Jamb, Econo-Jamb, Lo-Head Jamb; and including standard "jamb hardware"; sales records and purchase records of said Roscoe Fowler, Rosecoe Fowler d.b.a. Sturdee Steel Products Co., and predecessor companies, relating to "jamb hardware"; copies of all advertising and other literature of said Fowler, Sturdee Steel Products Co., and predecessor companies, illustrating or describing all styles of overhead door "jamb hardware," and information as



to the identity of trade magazines, newspapers and other advertising media employed for the purpose of advertising.

Date August 24, 1951.

[Seal]                    EDMUND L. SMITH,  
                                         Clerk.

By /s/ [Indistinguishable],  
                                         Deputy Clerk.

Return on Service

Received this subpoena at 610 South Broadway, Los Angeles, on August 28, 1951, and on August 28, 1951, at 6820 Brynhurst Avenue, Los Angeles, served it on the within named Plaintiff, Roscoe Fowler, by delivering a copy to him and tendering to him the fee for one day's attendance allowed by law.

Dated: August 28, 1951.

/s/ HARLAN P. HUEBNER.

Subscribed and sworn to before me, a Notary Public, this 28th day of August, 1951.

[Seal]    /s/ MARGARET BARNEY,  
Notary Public in and for the County of Los Angeles, State of California.

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

[Endorsed]: Filed October 15, 1951. [16]

[Title of District Court and Cause.]

## NOTICE UNDER R. S. 4920

Come now the Defendants herein and under Section 4920 of the Revised Statutes of the United States, 35 U. S. Code 69, give notice to the Plaintiff that, in support of their allegations of invalidity predicated upon prior use, prior invention, prior publication and want of invention heretofore pleaded in the Answer and based upon specific patents and instances of prior knowledge, prior use and prior publication, Defendants supplement the same by the following:

## Prior Patents

(In addition to those set forth in paragraph 16 of Defendants' Answer) namely:

Englerth .....	934,149
Claud-Mantle .....	2,185,214
St. John, Jr. ....	2,213,230
Gallagher, et al. ....	2,255,769
D'Alfonso .....	2,324,138
Violante .....	2,425,905

## Patents Showing Generally the State of the Art

N. W. Smith.....	2,569,351
Filed September 5, 1945	
Issued September 25, 1951	
N. W. Smith (Canadian) .....	465,423
Issued May 23, 1950	
Fowler, et al. ....	2,523,207
Filed January 14, 1946	
Issued September 19, 1950	

Publications

Building Supply News, issue of February, 1946, page 3, advertisement of Tavart Co., Ltd.

Western States A-E-C Catalog File 1946-47, section 12, advertisements respectively of Coffey Overhead Doors, Inc., Tavart Co., Ltd., Sturdee distributed by W. H. Steele Co. [18]

Western States A-E-C Catalog File 1947-48, section 12, advertisements respectively of Coffey Overhead Doors, Inc., Tavart Co., Ltd., Sturdee distributed by W. H. Steele Co.

Prior Knowledge and Use

Coffey Overhead Doors, Inc.,

J. T. Coffey,

C. E. Young,

4829 W. Pico Blvd.,

Los Angeles, Calif.

Norman W. Smith,

Address not yet known.

Earl F. Murphy,

Address not yet known.

Newland Top Shop,

4761 E. Olympic,

Los Angeles 22, Calif.

Harry Swensen,

1223 Ferris Avenue,

Los Angeles, Calif.

Defendants further state that the instances of prior knowledge and use by Coffey Overhead Doors, Inc., J. T. Coffey, C. E. Young, Norman W. Smith, and Earl F. Murphy, and all of the instances of

prior publication set forth in this notice were well known to the Plaintiff herein long prior to the commencement of this action but were not discovered by the Defendants or known to the Defendants with the certainty required by this notice [19] until within five days prior to the date of service upon Plaintiff.

Dated: October 23, 1951.

HUEBNER, BEEHLER,  
WORREL & HERZIG.

By /s/ VERNON D. BEEHLER,  
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 26, 1951. [20]

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[Title of District Court and Cause.]

SUPPLEMENTAL NOTICE UNDER  
R. S. 4920

Come now the Defendants herein and under section 4920 of the Revised Statutes of the United States, 35 U.S. Code 69, give notice to the Plaintiff that, in further support of their allegations of invalidity predicated upon prior use, prior invention, prior publication and want of invention heretofore pleaded in the Answer and in connection with which a Notice Under R. S. 4920 has been previously served upon Plaintiff, Defendants supplement the

previous notice and allegations of the Complaint with the following:

Prior Publication, Knowledge and Use  
Winchel Manufacturing Co., and  
H. N. Winchel,  
116 North Pomona Blvd.,  
Brea, California. [22]  
Stevens and Thuet,  
Aluma Door Company,  
Harry Berger,  
2165 West Cowles Street,  
Long Beach, California.

These instances of prior publication, knowledge and use were not given heretofore because they were not until this day discovered by Defendants.

Dated: October 29, 1951.

HUEBNER, BEEHLER,  
WORREL & HERZIG.

By /s/ VERNON D. BEEHLER,  
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 30, 1951. [23]



[Title of District Court and Cause.]

### MINUTE ORDER

Westover J.:

The Court finds the patent in issue is invalid because of prior invention, prior public use and for want of invention.

The Court also finds there is no evidence to support a finding of unfair competition and no evidence to support a charge of conspiracy.

Judgement will be rendered for defendants; Findings and Judgment to be prepared by counsel for defendants and presented to this Court by April 8, 1952.

Dated: March 19, 1952. [25]

---

[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Findings of Fact

##### I.

Plaintiff, Roscoe Fowler, is a citizen of the State of California, and resides in Los Angeles County.

##### II.

The Defendant, Vimcar Sales Company, is a corporation organized and existing under the laws of the State of California, and has a regular and estab-

lished place of business and is doing business in Los Angeles County within the Southern District of California, Central Division. [27]

### III.

The Defendant, Victor M. Carter, resides and has a regular and established place of business in Los Angeles County in the Southern judicial district of California. The defendant, Victor M. Carter, is the president, general manager and sole stockholder of the defendant, Vimcar Sales Company, and since 1948 has had control of all of the actions and activities of said corporation.

### IV.

Defendant, Morris J. Halopoff, resides and has a regular and established place of business in Los Angeles County in the Southern judicial district of California.

### V.

This action was instituted by the Plaintiff against the respective defendants jointly for alleged infringement of United States Letters Patent No. 2,516,196, granted July 25, 1950, upon an application of Roscoe Fowler filed November 14, 1949, the action being brought under 28 U.S.C. 1338(a), seeking the equitable remedy of an injunction and asking for an injunction and an accounting for profits and damages for said infringement and adding a prayer for treble damages. All three claims of the patent were involved.

## VI.

The Complaint included a second and separate cause of action instituted by the Plaintiff jointly against the respective Defendants for alleged unfair competition and a conspiracy among the Defendants to copy and manufacture and thereafter to sell products in imitation of plaintiff's product with the intent and for the purpose of confusing the buying public, said action being [28] brought under Section 28 U.S.C. 1338(b) and 15 U.S.C. 1121, 1126(h) and (i). The action based upon unfair competition and conspiracy seeks the equitable remedy of an injunction and asks for an accounting of profits and damages for said alleged acts of unfair competition and that the amount of said alleged damages be trebled.

## VII.

Defendants answered jointly attacking the validity of the patent, denying infringement thereof, and denying all charges of unfair competition and conspiracy.

## VIII.

Plaintiff was at the time of the institution of the suit and always had been owner of said U. S. Letters Patent No. 2,516,196.

## IX.

The subject matter of said Letters Patent No. 2,516,196 is an Adjustable Overhead Door Hinge employed primarily for overhead garage doors and consisting of a pair of hinges each incorporating a



bracket for attachment to the door jamb, a master arm pivoted at its mid-portion to the bracket, and at one end to an angle iron or side rail on the door, a cantilever arm pivoted at one end to the bracket and at its other end to a gusset plate attached to the side rail on the door, the cantilever arm being extendible for adjustment, and there being a counter-balancing spring attached at the end of the main arm remote from the door and attached to the door jamb below the plate.

## X.

Each of the three claims of Letters Patent No. 2,516,196 includes as an element a cantilever arm which is adjustable for [29] the purpose of adjusting the door to a vertical position, the means of adjustment being set forth in different phraseology in the three claims but covering essentially the same principle of alleged novelty.

## XI.

The patents, publications, and testimony of independent prior art uses listed below were offered in evidence by the Defendant as prior art and prior public use:

Wentworth .....	1,177,749
Mize .....	1,942,720
Guth .....	2,162,381
Wolf .....	2,166,898
Ferris .....	2,170,295
Holmes .....	2,228,314
Peck .....	2,233,638

Holmes .....	2,259,819
Wread .....	2,441,742
Englerth .....	934,149
Claud-Mantle .....	2,185,214
St. John, Jr. ....	2,213,320
Gallagher, et al. ....	2,255,769
D'Alfonso .....	2,324,138
Violante .....	2,425,905
Fowler, et al. ....	2,523,207
Smith .....	2,569,351

#### Publications

Building Supply News, issue of February, 1946,  
page 3, advertisement of Tavart Co., Ltd. [30]

Building Supply News, issue of January, 1947.

Western States A-E-C Catalog File 1946-47,  
section 12, advertisements respectively of Coffey  
Overhead Doors, Inc., Tavart Co., Ltd., Sturdee dis-  
tributed by W. H. Steele Co.

Western States A-E-C Catalog File 1947-48,  
section 12, advertisements respectively of Coffey  
Overhead Doors, Inc., Tavart Co., Ltd., Sturdee dis-  
tributed by W. H. Steele Co.

#### Prior Knowledge and Use

Tavart Company,  
15134 South Orizaba Avenue,  
Paramount, California.

Roscoe Fowler,  
6820 Brynhurst Avenue,  
Los Angeles, California.

Coffey Overhead Doors, Inc., and  
J. T. Coffey,  
4829 W. Pico Boulevard,  
Los Angeles, California.

Norman W. Smith,  
Earl F. Murphy,  
Newland Top Shop,  
4761 E. Olympic,  
Los Angeles, California. [31]

Winchel Manufacturing Co., and  
H. N. Winchel,  
116 North Pomona Blvd.,  
Brea, California.

Stevens and Thuet and  
Aluma Door Company,  
2165 West Cowles Street,  
Long Beach, California.

## XII.

The prior art, prior publications, and prior public use listed above, all of which were considered by this Court, illustrates numerous examples of overhead garage door hardware both of the pivot type and the jamb type.

## XIII.

The Defendants, Vimcar Sales Company, and Victor M. Carter, did not engage in the manufacture of any adjustable jamb type garage door hardware but engaged only in the marketing and sale of said adjustable jamb type garage door hardware. The Defendant, Morris J. Halopoff, was engaged primarily

in the manufacture of said adjustable jamb type garage door hardware to the extent that said hardware comprised the accused structure and Defendant, Morris J. Halopoff, supplied the hardware thus manufactured to the Defendants Vimcar Sales Company and Victor M. Carter.

#### XIV.

In the prior art and prior public use are examples which show adjustable jamb type garage door hardware with an adjustment at the jamb plate for adjusting the cantilever arm to place the garage door in a vertical position and adjustment at the end of the cantilever arm where it joins the door for precisely the same purpose. [32]

#### XV.

The differences disclosed and attempted to be claimed in Fowler Patent No. 2,516,196 over the prior art are so insignificant as to be the work merely of a skilled mechanic and do not involve patentable invention.

#### XVI.

The patentee Fowler of Patent No. 2,516,196 failed to carry his date of invention back of January, February, or maybe March of 1949.

#### XVII.

Various and sundry prior art users manufactured, used and sold adjustable jamb type garage door hardware the same as or substantially the same as the adjustable jamb type garage door hardware of the patent at a date prior to any alleged invention

of the patent in suit, and these prior art uses were not considered by the Patent Office when the patent in suit was issued.

### XVIII.

Various and sundry prior art users, including the plaintiff, manufactured, used and sold to the public generally adjustable jamb type garage door hardware the same as or substantially the same as the alleged invention of the patent in suit at a date more than one year prior to November 14, 1949.

### XIX.

Defendant's structure accused as being an infringement is substantially the same as the structure of the patent in suit and is an infringement of all of the claims of said patent if the the same is [33] valid.

### XX.

The evidence is not sufficient to show a conspiracy.

### XXI.

Since on or about 1945 the defendant Vimcar Sales Company, a corporation, has used the trade name "Olympic."

### XXII.

During the period of time that Defendant Vimcar Sales Company, a corporation, was selling plaintiff's adjustable jamb type garage door hardware, all such sales were made by it in its own name and with the use of its own trade name, "Olympic"; the sale by Defendant Vimcar Sales Company, a corporation, of Plaintiff's adjustable jamb type



garage door hardware under Defendant's name and trade name "Olympic" was with the consent and knowledge of the Plaintiff.

### XXIII.

The Defendant Morris J. Halopoff was engaged in the business of manufacturing jamb type garage door hardware approximately one year prior to the time that said Defendant met the other Defendants herein.

### XXIV.

The Defendants have not passed off on the public their adjustable jamb type garage door hardware as that of Plaintiff's, nor has the public been deceived by the Defendants, or any of them, as to the origin of the manufacture of said adjustable jamb type garage door hardware.

### XXV.

All adjustable jamb type garage door hardware sold by [34] the Defendant Vimcar Sales Company and manufactured by the Defendant Morris J. Halopoff for the Defendant Vimcar Sales Company bore or carried the mark "Olympic" and the name Vimcar Sales Company; each set of adjustable jamb type garage door hardware was packaged in an individual package, in which package there was placed an instruction sheet with the name "Vimcar Sales Company" plainly displayed thereon.

### XXVI.

The adjustable jamb type garage door hardware manufactured by the Plaintiff has no ornamental



or non-functional features, and any reproductions thereof by Defendants were of functional features only.

### XXVII.

At the time of the Defendant Morris J. Halopoff commenced manufacturing and selling adjustable jamb type garage door hardware to the Defendant Vimcar Sales Company the patent in suit had not yet issued. At the time the Defendant Morris J. Halopoff manufactured and sold adjustable jamb type garage door hardware to the Defendant Vimcar Sales Company, and at the time that Vimcar Sales Company first sold said adjustable jamb type garage door hardware under its own name, Vimcar Sales Company, and the mark "Olympic," the patent in suit had not issued. However, all of the Defendants were notified of the pendency and imminent issue of the patent in suit.

### XXVIII.

Defendant Vimcar Sales Company, a corporation, sold adjustable jamb type garage door hardware long prior to the time when it purchased adjustable garage door hardware from the Plaintiff. [35]

### Conclusions of Law

1. This Court has jurisdiction of the subject matter involved herein and of the parties hereto under the patent and trade-mark laws and the Judicial Code, more particularly R. S. Section 4121, 35 U.S.C. 70, Section 24 of the Judicial Code and

under 28 U.S.C. 1338(a), 1338(b) and 15 U.S.C. 1121, 1126(h) and (i).

2. Joint Fowler and Murphy Patent No. 2,523,207, issued September 19, 1950, on an application filed January 14, 1946, discloses the alleged inventive subject matter and is a prior invention.

3. Claims 1, 2 and 3 of said Letters Patent in suit No. 2,516,196 are invalid for want of invention over the prior art.

4. Claims 1, 2 and 3 of the patent in suit No. 2,516,196 are invalid because of prior invention.

5. Claims 1, 2 and 3 of the patent in suit No. 2,516,196 are invalid because of prior public use.

6. All claims of said Letters Patent in suit No. 2,516,196 are invalid but if valid, all of said claims would be infringed.

7. There has been no unfair competition on the part of any of the Defendants.

8. No acts by the Defendants in concert in any manner have been found sufficient to support a charge of conspiracy and [36] there has been no conspiracy.

9. The Complaint should be dismissed for want of equity and costs be allowed Defendants, including reporters' fees.

Dated at Los Angeles, California, this 6th day of May, 1952.

/s/ HARRY WESTOVER,  
Judge.

The foregoing Findings of Fact and Conclusions of Law are disapproved as to form.

Dated: April 26, 1952.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By /s/ ROBERT W. FULWIDER,  
Attorneys for Plaintiff.

The foregoing Findings of Fact and Conclusions of Law are approved as to form.

Dated: April 22, 1952.

HUEBNER, BEEHLER,  
WORREL & HERZIG, and  
VERNON D. BEEHLER.

By /s/ VERNON D. BEEHLER.

Dated: April 23, 1952.

/s/ BENJAMIN J. GOODMAN,  
Attorneys for Defendants.

[Endorsed]: Filed May 6, 1952. [37]

In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 13002-HW

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, VICTOR M.  
CARTER and MORRIS J. HALOPOFF,

Defendants.

### FINAL JUDGMENT

This action having come to be heard by this Court was tried and argued by counsel for the respective parties and thereupon, and upon consideration thereof,

It Is Ordered, Adjudged and Decreed:

#### I.

That the Complaint herein be and hereby is dismissed upon the merits.

#### II.

Costs be awarded the Defendants to be taxed in the sum of \$. . . . . and that Defendants have execution for the same.

Dated this 6th day of May, 1952.

Los Angeles, California.

/s/HARRY WESTOVER,

Judge. [38]

The foregoing Final Judgment is approved as to form.

Dated: April ..., 1952.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By.....,  
Attorneys for Plaintiff.

The foregoing Final Judgment is approved as to form.

Dated: April 8, 1952.

HUEBNER, BEEHLER,  
WORREL & HERZIG, and  
VERNON D. BEEHLER.

By /s/ VERNON D. BEEHLER.

Dated: April 8, 1952.

/s/ BENJAMIN J. GOODMAN,  
Attorneys for Defendants.

Receipt of copy acknowledged.

Lodged April 18, 1952.

Judgment entered May 6, 1952.

[Endorsed]: Filed May 6, 1952. [39]



[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Vimcar Sales Company, Victor M. Carter and  
Morris J. Halopoff, and to Their Attorneys,  
Huebner, Beehler, Worrel & Herzig, and Ben-  
jamin J. Goodman:

Notice is hereby given that Roscoe Fowler, the  
plaintiff above named, hereby appeals to the United  
States Court of Appeals for the Ninth Circuit from  
the Final Judgment entered in this action on May  
6, 1952.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By /s/ ROBERT W. FULWIDER,  
Attorneys for Plaintiff-  
Appellant.

RWF/bdj

[Endorsed]: Filed June 5, 1952. [41]

[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents That St. Paul-  
Mercury Indemnity Company, a corporation or-  
ganized and existing under the laws of the State of  
Delaware, and duly licensed to transact business in  
the State of California, is held and firmly bound  
unto Vimcar Sales Company, Victor M. Carter and



Morris J. Halopoff, defendants in the above-entitled case, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to said defendants, their successors, assigns, or legal representatives, for which payment well and truly to be made, the St. Paul-Mercury Indemnity Company binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, Roscoe Fowler, the plaintiff, is about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered by the United States District Court for the Southern District of California, Central Division, in [42] the above-entitled case, on May 6, 1952, in favor of the defendants.

Now, Therefore, if the above-named plaintiff shall prosecute said appeal to effect and answer all costs which may be adjudged against him if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 5th day of May,  
1952.

[Seal]                      ST. PAUL-MERCURY  
                                         INDEMNITY COMPANY.

By /s/ W. A. LAWRENCE,  
Attorney in Fact.

Examined and recommended for approval as pro-  
vided in Rule 8.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By /s/ ROBERT W. FULWIDER,  
Attorneys for Plaintiff-  
Appellant.

I hereby approve the foregoing bond.

Dated the 5th day of June, 1952.

EDMUND L. SMITH,  
Clerk, U. S. District Court.

By /s/ CHARLES A. SEITZ,  
Deputy.

[Endorsed]: Filed June 5, 1952. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-  
ING APPEAL AND FILING RECORD  
THEREON

The plaintiff-appellant Roscoe Fowler, having on June 5, 1952, filed his Notice of Appeal from the judgment heretofore rendered in this action; now on application of said plaintiff-appellant, the Court being fully advised, and good cause appearing therefor:

It Is Hereby Ordered that the time in which plaintiff-appellant herein may docket his appeal in this cause and file the record on appeal with the Clerk of the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 15th day of August, 1952.

Dated at Los Angeles, California, this 30th day of June, 1952.

/s/ HARRY WESTOVER,  
U. S. District Judge.

Presented by:

/s/ ROBERT W. FULWIDER,  
Attorneys for Plaintiff-  
Appellant.

RWF/bdj

[Endorsed]: Filed June 30, 1952. [51]

In the United States District Court, Southern  
District of California, Central Division

No. 13002-HW Civil

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, etc., et al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

November 8, 1951

Appearances:

For the Plaintiff:

FULWIDER & MATTINGLY, by  
ROBERT W. FULWIDER, ESQ.

For the Defendants:

HUEBNER, BEEHLER, WORRELL &  
HERZIG, by  
VERNON D. BEEHLER, ESQ., and  
BENJAMIN J. GOODMAN, ESQ.

\* \* \*

OPENING STATEMENT ON BEHALF  
OF THE PLAINTIFF

Mr. Fulwider: The patent in suit will be Exhibit 1 for plaintiff, and I think, Mr. Beehler, we might stipulate now, if it is agreeable with you, that soft copies furnished by the Patent Office of the United States may be substituted in lieu of originals or certified copies by both plaintiff and defendant.

Mr. Beehler: So stipulated.

Mr. Fulwider: So I exhibit the original and ask [8\*] to have this soft copy marked. I have an extra copy here you might hand up to the judge, if you will, Mr. Clerk, for his own marking up purposes.

The Court: It may be received and marked Exhibit No. 1.

\* \* \*

Mr. Fulwider: As Plaintiff's Exhibit 2, I would like to introduce an actual set, or, rather, half a set, of plaintiff's hardware and have that marked.

Will you stipulate this is a piece of Sturdee hardware, Mr. Beehler?

Mr. Beehler: I will so stipulate.

The Court: It may be received and marked as Exhibit 2.

\* \* \*

Mr. Fulwider: As our Exhibit 3, I would like to have marked for identification—we can think about the matter of evidence later—this little model of hardware which is typical of both plaintiff's and defendants'. I might state that this particular

---

\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



model, I am informed, was made a couple of years ago while plaintiff was supplying hardware to Vimcar, [9] and several of these little models were supplied to Vimcar to assist them in selling. We happened to find this old one.

We have made this change. The models that were submitted to Vimcar at that time being purely advertising helps, did not have the particular adjustability in the jag link or pivot, so we have modified this by putting slots in the little pivot arm there so it is exactly like the patent and like our hardware except, as I say, some of the dimensions are a little bit different. So I think it ought to be marked just for identification.

\* \* \*

The Court: It may be received and marked Exhibit 3 for identification only. [10]

\* \* \*

Before going directly to the defendants' hardware, I would like to turn for a moment to the claims which, of course, are the real essence of any patent, and to facilitate the court's consideration of these, I have prepared some claim outlines or analyses, I call them, which I like to talk from, and probably your Honor would like one also. I have a copy here for counsel. May that be marked the next number?

The Court: Mark it Exhibit 4. [18]

\* \* \*

This, I believe, would be a good time to put in the defendants' hardware so that the court can see



how similar it is in all respects. This will be what number?

The Court: No. 5 would be next.

The Clerk: In evidence, your Honor?

Mr. Fulwider: I would like to offer this in evidence. I assume you will stipulate that is a Vimcar product?

Mr. Beehler: Where was it bought?

Mr. Fulwider: Builders Supply.

The Court: It may be received and marked Exhibit 5.

\* \* \*

Mr. Fulwider: So that there won't be any confusion between the two, your Honor will note that this hardware carries a little yellow label that says Olympic. [24]

\* \* \*

The Court. Mr. Beehler, will you come up here and show [25] me where the difference is between the two exhibits?

Mr. Beehler: There isn't any essential difference.

The Court: All right.

Mr. Fulwider: Good. We are agreed on that.

Just to complete the record on the identity and to give your Honor something that is a lot easier to handle than pieces of hardware, we have prepared a composite drawing in which we cut out the figures of the patent, and then we had a draftsman, used by both Mr. Beehler and our office, to draw the defendants' hardware in exactly the same position to the extent he was able by reason of its physical structure.

I would like, if I may, to offer that as Exhibit 6 so that we have something that is readily handled. I have a copy here for you. This is for identification, of course. It is merely illustrative.

The Court: It may be marked for identification only.

The Clerk: So marked, Plaintiff's Exhibit 6. [26]

\* \* \*

As further visual aid on this, and again principally to just facilitate things and make the record, I would like to offer as Exhibit 7 a pair of photos which we have hinged together. The left-hand photo shows the plaintiff's hardware partly assembled in about the same position as we had it up there on the clerk's desk. The right-hand photo shows the defendants' hardware in a similar position.

The Court: It may be marked Exhibit 7. Are they to be introduced in evidence? [27]

\* \* \*

The Court: When did the defendant start to make its hardware?

Mr. Fulwider: It started purchasing from the plaintiff in July, 1949. About two or three months, two or three months after the plaintiff first came on the market, they started purchasing, and then in the fall of 1949, negotiations were had between the defendants—— [28]

\* \* \*

The Court: Do I understand, except for that difference, it was practically the same?

Mr. Fulwider: Very similar, your Honor.

The Court: In other words, all you have done is change the slot to a bolt?

Mr. Fulwider: That is one of the main differences.

The Court: Is that what you base your patent on?

Mr. Fulwider: One of the most important features of this thing is that slotted pivot arm and its advantages over a sliding jamb bracket up here like Tavart has done, or try to fuss around with slotting down here on this end.

The Court: Let me see if I understand correctly. In the previous structure, there was just one bar but there was a slot on the end with which it was regulated?

Mr. Fulwider: That's right.

The Court: In your structure, there are the two bars, and it is bolted at the end?

Mr. Fulwider: Yes. The ends are fixed.

The Court: That is the main difference? [30]

\* \* \*

I have some more photos here which also were made of these two exhibits which are in evidence, the plaintiff's hardware, Exhibit 2, and the defendants', 5. These photos, like the preceding ones we offered—I offer this as Exhibit 8.

The Court: Exhibit 8 for identification.

\* \* \*

Mr. Fulwider: —show on the left-hand side the plaintiff's hardware with the door closed, and

on the right-hand side the defendants' hardware with the door closed.

That isn't actually a door in there. It is a two by four that we laid alongside the side rail to indicate the jamb. So we have placed legends on here indicating [31] which is the jamb and which is the door. They point out the similarity we are talking of.

Then we have one more photograph, which we will offer as Exhibit 9, showing that same hardware with the door rotated to full open position corresponding to the dotted outlines of Fig. 1 in the patent in suit.

The Court: It may be received as Exhibit 9 for identification only. [32]

\* \* \*

I would like to introduce at this time one of those instruction sheets which the plaintiff was using at that time and is still using and, as I understand it, one of these instruction sheets, or these instruction sheets with the name Econo-Jamb and Sturdee cut off were used temporarily in packing the Olympic hardware which plaintiff was selling to the defendant.

The Court: It may be marked Exhibit 10 for identification. [39]

\* \* \*

I would like to offer this, which I am informed is one of the first sheets printed by Olympic, that is, by Vimcar and supplied to Fowler for him to stuff into the boxes that he shipped to them.

The Court: It may be marked for identification only as Exhibit 11. [41]

\* \* \*

I would like to submit one of defendants' later sheets, which they are still making—I am not sure whether they are now making it, but which they were making as of early this year, and call attention to the fact that no substantial change, no significant change has been made or was made between the old sheets and the newer ones.

The Court: It may be marked for identification only as Exhibit 12. [42]

\* \* \*

I would like to put in one of the most current of Vimcar's sheets, so far as we are advised.

The Court: It may be marked Plaintiff's Exhibit 13 for identification only. [43]

\* \* \*

Mr. Fulwider: To illustrate the hardware sold by plaintiff, I would like to introduce in evidence a current folder, which will be 14.

The Court: It may be marked for identification only, unless it is stipulated. [45]

\* \* \*

Mr. Fulwider: Just one more exhibit of this type and then this part will be finished, that is a little brochure put out by Vimcar, which we offer as Exhibit 15.

The Court: Exhibit 15 for identification [46] only.

\* \* \*



I would like to offer on the matter of notice and wilfulness, to show that these people were notified as soon as we had knowledge of what they were doing, and that they were notified, as a matter of fact, even before the patent issue, some letters. Mr. Beehler and I have stipulated we can use photostats in lieu of the originals of these letters. I have here letters of infringement sent to Vimcar and to Halopoff, each dated March 10. Perhaps these can be clipped together as one exhibit, A and B.

The Court: All right.

The Clerk: The one to Vimcar will be 16 and the other 16-A, your Honor. [47]

\* \* \*

I have one other letter I think is pertinent to that same issue. That is a letter written to Huebner, Beehler, Worrell, Herzig and Caldwell which I would like to offer as Exhibit 17, written on August 7, 1950, after the patent issued.

The Court: That will be Exhibit 17. [48]

\* \* \*

Mr. Fulwider: Just one other exhibit, which can be stipulated to, and which we will offer in evidence as Exhibit 18, which is a catalog of the Builders Emporium, which is a corporation, as I understand from Mr. Carter's deposition, owned by him as a retail outlet. My thought would be since the catalog is fairly bulky, I have had photostats of the cover page and the one page pertaining to the case, and which we might stipulate we can merely put in with photostats, rather than burdening the record with the catalog itself, or put in the negative and



see if that shows up. It doesn't show up as clearly as the catalog, but we can refer to the catalog, if necessary.

Is that satisfactory to you, Mr. Beehler?

Mr. Beehler: That is satisfactory. [49]

\* \* \*

I would like to have introduced as our next exhibit, which I believe would be 19, a letter written on Vimcar stationery dated April 5, 1950, by Mr. Harry Korse, purchasing agent, which I assume that Mr. Beehler will stipulate is in fact a letter sent by his client Vimcar per Mr. Korse.

Mr. Goodman: We have no objection.

Mr. Fulwider: It is stipulated that may be received in evidence as our Exhibit 19 then.

The Court: It may be received and marked Exhibit 19. [53]

\* \* \*

The Court: If the catalog was published, did it use the name of the plaintiff's structure?

Mr. Fulwider: No. Vimcar always used its own name. We are not charging any unfair competition by reason of trade-mark infringement or trade name infringement.

The Court: Do I understand even when you sold your structure to Vimcar, Vimcar resold it under Vimcar's name?

Mr. Fulwider: That's right, your Honor, which they had a perfect right to do, of course.

The Court: They had a right to do it if you let them do it. [55]

\* \* \*

OPENING STATEMENT ON BEHALF  
OF THE DEFENDANTS

Mr. Beehler: Before making an opening statement, there is a witness here whom both counsel have now talked to, who came to identify certain photographs. We are in agreement that they can be stipulated to as exhibits. I would like to offer them while he is still here so he can be released.

The Court: How many pictures have you?

Mr. Beehler: Five snapshots.

The Court: Do you want them introduced as one exhibit?

Mr. Beehler: As one exhibit, A, B, C, D, and E.

The Court: They may be introduced as Exhibits A-1, A-2, A-3, A-4 and A-5.

The Clerk: In evidence, your Honor?

The Court: Yes, in evidence.

\* \* \*

Mr. Beehler: They are photographs of the installation [59] of jamb hardware at the Newland Tops Shop and they are stipulated to as having been installed in January of 1946.

\* \* \*

I believe at this point to trace the history very briefly of that jamb type hardware, I will offer in evidence the exhibits which were offered at the taking of the deposition of Mr. Fowler, and at the same time that deposition. [60]

The Court: It may be received. The deposition may be received and marked Exhibit B. [61]

\* \* \*

Mr. Beehler: I wish, therefore, to file now the original of the requests for admissions as Defendants' Exhibit next in order.

The Court: It may be received and marked Defendants' Exhibit C.

Mr. Beehler: With the accompanying photo-stats, four in number.

The Clerk: Those are all attached, your Honor. Shall they just be a part of Exhibit C?

The Court: Yes, part of Exhibit C. [63]

\* \* \*

I would like to introduce in evidence at this time page 28 of the Vimcar catalog No. 15, which is a full page showing of jamb type garage door hardware sold under the Tavart label, but sold by the Vimcar Sales Company.

The Court: It may be marked Exhibit D. First, can you tell me the date?

Mr. Beehler: The date of that particular catalog is February, 1948. [65]

\* \* \*

Mr. Beehler: That is a date which anticipates by more than one year the filing date of the patent in suit.

With respect to the advertising aid which appears on the court's bench, I call attention to that same page of the catalog, No. 15, in the middle of the right-hand side where the same advertising aid is pictured. It was then used as an advertising aid for the Tavart hardware, which was distributed by the defendant Vimcar. [66]

\* \* \*

## CARVEL MOORE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

\* \* \*

## Direct Examination

By Mr. Fulwider: [70]

\* \* \*

Q. What is your business or profession, Mr. Moore?      A. Industrial design.

Q. Do you do any work for the plaintiff, Mr. Fowler?      A. Yes.

Q. What has been the nature of your duties with him?

A. Designing and industrial advertising.

Q. How long have you been doing that work for him?      A. Oh, for about five years.

Q. During the course of your work for Mr. Fowler, have you had occasion to take photographs of hardware manufactured by him?

A. Yes, as aids to advertising.

Q. As part of your business, do you do photographing generally?      A. Yes.

Q. To what extent are you familiar with photographs, taking them, processing them, converting them into printing aids, and so forth?

A. All of that would be incidental to the advertising.

Q. That is a standard part of your [71] business?      A. Yes.

\* \* \*



(Testimony of Carvel Moore.)

Q. (By Mr. Fulwider): Will you examine this photograph, Exhibit 21, and identify it for me, if you can, and compare it with the cut on Exhibit 14?

A. It is the same photograph.

Q. Do you find any particular points of similarity there that are the basis of your opinion that it is the same photo?

A. I would say the nail and the flexible conduit, and the junction box.

Q. Would you point out those to the court?

The Court: You will have to speak aloud. The reporter has to get your testimony.

The Witness: It would be the flexible conduit coming [72] between the studs, and the nail right above the power arm, and the junction box appearing right below the bracket, the jamb bracket.

Q. (By Mr. Fulwider): Can you tell me approximately, or do you know approximately when that part of Exhibit 21 was made, that is to say, when the negative was photographed?

A. It would be in the fall of 1949.

Q. The fall of 1949. Was that part of some other photographs that you made, or do you recall?

A. Yes. This was part of a series we took upon the request Mr. Fowler received from Vimcar.

Mr. Fulwider: I have three other photographs which I should like to mark as an exhibit with one number and then A, B, C, if I may, because I would like to tie them in to one of our previous exhibits.

The Court: They may be marked Plaintiff's Exhibits 22-A, -B and -C.



(Testimony of Carvel Moore.)

The Clerk: In evidence, your Honor?

The Court: In evidence.

The Clerk: So marked.

(The photographs were received in evidence and marked Plaintiff's Exhibits 22-A, 22-B and 22-C.)

Q. (By Mr. Fulwider): Now, Mr. Moore, I call your attention to three photos, 22-A, -B and -C, and ask you if you can identify those photographs for me, and in so doing compare [73] 22-B with 21 that you were just looking at.

A. This photograph, Exhibit No. 21——

Q. That is the one which I believe is a reverse print of B.

A. The photograph of Exhibit 21 is the reverse of the photograph marked No. 22-B.

Q. Do you have the negatives for all of those photographs, Exhibits 21 and 22? A. Yes.

Q. If you will, lay photographs 22-A, -B and -C out in order from left to right, and then compare them with Plaintiff's Exhibit 15, which is a Vimcar brochure, which on its reverse side shows three prints or three cuts. Will you compare those and see if you find any similarity between the three exhibits, 22-A, -B and -C, and the three pictures on this brochure, Exhibit 15, and if you see any similarity, will you point out to the court some of those similarities sufficient upon which to predicate your opinion.

A. They are taken from the same photographs.

(Testimony of Carvel Moore.)

There has been some art work applied to the background to touch out some of the objectionable points of the photograph.

Q. In 22-A, I believe there is a nail and nut that show up in the studding. Is there a similar nail and knot apparent in the left-hand photograph on 15?

A. Yes, the nail and the knot hole in the studding to [74] the left of the hardware.

Q. Are there any other particular points there that you see?

A. I think all the pertinent points of the photograph, the tar paper background, the position of the door, and the hardware.

Mr. Fulwider: I wonder if we may, your Honor, have the witness mark on the top, the left-hand photo, the letter A, so that we can know that is the one he compared to our Exhibit 22-A, just put an A right above in there.

The Court: Yes.

(Witness complying.)

Q. (By Mr. Fulwider): And while you are at it, put a B and C here, and then it is all done.

(Witness complying.)

Q. Now, will you compare the center cut B with our 22-B in the same manner?

A. I would say it is the same photograph. However, the hardware on the left, that is the hardware in the closed position, has been touched out of the photograph with an air brush.

(Testimony of Carvel Moore.)

Q. So that cut B in Exhibit 15 is only half, so to speak, of the photograph 22-B? A. Yes.

Q. That is the right half? [75] A. Yes.

Q. I believe that one also has a nail up in the studding there.

A. It shows the same condition with the nail in the studding and the flexible conduit coming down between the two studs.

Q. Will you make the same comparison between the cut C on Exhibit 15 and the photograph 22-C?

A. The same touch-up has been applied there. The left of the jamb has been air brushed. However, the background remains with the studding showing, the same position of the hardware, and the door stop appears at the bottom.

Q. Did I ask you, can you tell me approximately when these photographs, 22-A, -B and -C were taken? Did you take them? A. Yes.

Q. And when? A. In the fall.

Q. You took them, you say? A. Yes.

Q. That was in the fall of 1949? A. Yes.

The Court: In 1949?

Mr. Fulwider: Yes, your Honor.

Q. (By Mr. Fulwider): And these particular prints in [76] evidence, you had made from photographs in your possession, did you not?

A. That is correct.

Q. And you gave them to me?

A. Yes, that's right.

Q. Incidentally, will you compare this cut on page 2 of plaintiff's Exhibit 18, which is the Build-

(Testimony of Carvel Moore.)

ers Emporium catalog, and tell me whether or not the cut shown in the upper left-hand corner of this is the same or different from the right-hand half of 22-B.

Mr. Fulwider: This cut is the one shown here, your Honor, in this photostat. This is a little more clear here than it is there.

The Witness: It is the same photograph, the same condition prevails where a touch-up has been done to the left of the hardware to take out the background.

Q. (By Mr. Fulwider): Mr. Moore, will you examine Exhibit 10, which is the Econo-Jamb instruction sheet put out by Mr. Fowler, and can you tell me who did the art work on that?

A. I did the art work.

Q. When was that art work done?

A. In February, 1949.

Q. In February, 1949. Have you done all of Mr. Fowler's art work since then, so far as you [77] know? A. Yes.

Q. Have there been any modifications of any instruction sheets for the Econo-Jamb made by you?

A. No, sir.

Q. Do you know of any put out by Mr. Fowler?

A. No.

Q. To the best of your knowledge, the use of Exhibit 10 was started by Mr. Fowler in—February, did you say? A. Yes.

Q. —1949, and it is continuing to date?

A. Yes.



(Testimony of Carvel Moore.)

Mr. Fulwider: I think Mr. Beehler has only stated exhibits of Vimcar's instruction sheets were theirs. I would like to take a few minutes to prove by this witness—

The Court: Exhibit 10 has never been introduced in evidence, according to my record.

Mr. Fulwider: Thank you very much. I now offer it in evidence.

The Court: It may be received in evidence.

The Clerk: So marked, Exhibit 10.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Fulwider: I would like to prove up these three Vimcars here by having this witness compare them with Exhibit 10, and those are Exhibits 11, 12 and 13. [78]

Q. I show you here, Mr. Moore, Exhibits 11, 12 and 13, which have been stipulated to be Vimcar instruction sheets, and ask you if you have compared those or similar sheets with Exhibit 10, and whether or not you can tell me that there are any substantial differences?

I call your attention first to Exhibits 11 and 12.

A. No. The art work is identical. The only change that has been made is, as pointed out previously, in the title.

Q. Now, will you compare Exhibit 13 with Exhibits 11 and 12, and I call your attention particularly to the bracket indicated here in Fig. 2, and the two lag screws, whereas the bracket in Fig.



(Testimony of Carvel Moore.)

2 in Exhibit 11 has three, and there is a little difference in the corner.

Can you tell me whether or not you have found any other differences than those two I mention there?

A. The bracket has been changed in steps 4 and 5 of Vimcar's instruction sheet.

Q. In the same manner as changed in 2?

A. In the same manner as changed in step 2.

Q. You find no other differences?

A. Other than that, the art work is identical.

Mr. Fulwider: I offer that in evidence, your Honor, as 13. [79]

The Court: 13 has already been introduced in evidence. 14 has not been received in evidence.

Q. (By Mr. Fulwider): I call your attention, Mr. Moore, to the Sturdee brochure, Exhibit 14. Can you identify that for me?

A. Yes. This is a brochure I prepared for Sturdee steel.

Q. You did the art work in it and the general layout for it?           A. Yes, sir.

Q. Can you tell me approximately when that art work and layout was done and that brochure was printed? Maybe not that particular piece of paper, but that style.           A. This is a re-run.

Q. This particular one is a re-run?

A. Yes. I would say it was re-run in the fall of 1949.

Q. When was the original art work and the first printing?

(Testimony of Carvel Moore.)

A. The first printing was in February, 1949.

Mr. Fulwider: I offer that in evidence, your Honor.

Mr. Beehler: I couldn't hear the witness.

Mr. Fulwider: He said the first printing was in February, 1949.

Mr. Beehler: Thank you. [80]

Mr. Fulwider: 14 is offered in evidence, your Honor.

The Court: It may be received.

The Clerk: So marked, Plaintiff's Exhibit 14 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 14.)

The Court: May I just be sure that I have something straight here?

Mr. Fulwider: Yes, your Honor.

The Court: According to this witness, that original run was in February, 1949. The application for your patent was not until November of that year.

Mr. Fulwider: That is correct, your Honor.

The Court: This original run was in February and the application for patent was in November of that year.

Mr. Fulwider: Yes, the same year. We were cutting it very close.

The Court: All right.

Q. (By Mr. Fulwider): Can you tell me the circumstances surrounding the making by you of

(Testimony of Carvel Moore.)

these photographs, Exhibits 22, which you have previously identified here as made by you? Do you have any recollection as to the occasion of making those photographs, for whom they were made, or why they were made?

A. Yes. Mr. Fowler contacted me on a Friday evening [81] as a result of a request from Vimcar to take some advertising photographs of Econo-Jamb. Mr. Fowler and I took them on Saturday morning. They were processed over the week end, and one set was mailed to Vimcar the following Monday. This was in August, 1949.

Q. Who did that mailing?

A. I did the mailing.

\* \* \*

### Cross-Examination

By Mr. Beehler:

Q. May I ask the witness if he was the photographer of the photographs which were used on the cut of the brochure which he compared with the photographs he said he made?

A. Are you referring to Vimcar's brochure?

Q. Vimcar's brochure, yes.           A. Yes.

Q. You are the photographer of the photographs used in the cuts?

A. Yes. I took the photographs for Sturdee, which were forwarded to you.

Q. Did you make the photographs which were used in making the cuts? [82]

(Testimony of Carvel Moore.)

A. Yes. I would have no evidence whether you used our photographs or copied them.

Q. Your comparison then was one of eye appearance alone, is that correct?

A. The physical specifications on each photograph.

Q. Were you aware Vimcar was using all those photographs as its own, for their own advertising publication ever since you photographed them and gave the photographs to Mr. Fowler?

A. I would assume that is what they were used for. They were furnished for sales.

Q. When you made the drawings of the original instruction sheets for the Econo-Jamb, Exhibit 10, where did you get the information?

A. Obtained the information from Mr. Fowler, Sturdee Steel.

Q. Was that information given to you as information concerning a specific structure or was that given to you as standard carpenter instruction variety?

A. That information is usually forwarded through door hangers' information or through the information developed by the manufacturer in his own shop.

The Court: May I ask a question? When you got this information, were you given pictures or drawings, or was it oral information that you [83] got?

The Witness: No, sir. We usually prepare the drawings from a set of the hardware in their own



(Testimony of Carvel Moore.)

shop, or he supplies me with a set of hardware to draw from.

The Court: And did he supply you with a set of hardware to make drawings from?

The Witness: I took the dimensions off a set existing in the shop on a test stand there.

The Court: Then you got your information direct from a set of hardware?

The Witness: Yes.

Q. (By Mr. Beehler): From what did you get the information with respect to the joists and construction of the garage itself, to which the hardware was applied?

A. I would say that was strictly artistic license on drawing that arrangement of studding. There are quite a few variations that could be made on that. That is the architectural feature, and not the hardware.

Q. Will you read, please, the directions on Exhibit 10 the portion that I indicate here with the circle?

A. "Thickness of door."

Q. "Thickness of door." Go ahead.

A. "The distance T from the inner face of the header to the inner face of the jamb should not be more or less than  $\frac{1}{2}$ " the thickness of the door."

Q. Now, will you read what it says here where I am [84] indicating?

A. "20 $\frac{1}{4}$ " plus door thickness."

Q. Now, will you compare that with this language indicated in the circle A?

A. Do you want me to read it out loud?



(Testimony of Carvel Moore.)

Q. If you will, please.

A. "Thickness of door. The distance 'A' from the inner face of the header to the inside of the jamb should not be more or less than  $\frac{1}{2}$ " the thickness of the door."

Q. That is identical, is it not?           A. Yes.

Q. Now, will you read B?

A. "20 $\frac{1}{4}$ " plus door thickness."

Q. That is identical, is it not?           A. Yes.

Q. Were you the artist who prepared the sketches on this sheet which I show you here?

Mr. Fulwider: What is that sheet?

Mr. Beehler: I asked him if he recognizes it.

Mr. Fulwider: I'm sorry.

The Witness: No.

Q. (By Mr. Beehler): Do you recognize the name of this company?           A. No.

Mr. Beehler: I would like to introduce this sheet in [85] evidence as Defendants' Exhibit next in order for the purpose of showing that such language is purely instructional and is a part of the public domain.

Mr. Fulwider: Object to the offer at this time because I don't think there has been anything about when it was put in, whether that is prior to Mr. Moore's instruction sheet.

The Witness: I would say that this drawing here is taken off——

The Court: Just a minute. There is no question put to the witness. I don't know whether they want you to volunteer any information or not.

(Testimony of Carvel Moore.)

The Witness: He asked me if it was the same. I am sorry.

The Court: We will have it marked for identification only until you can establish the time. If it was after, I don't know whether it makes any difference or not. If it was before, it might make a lot of difference.

Mr. Beehler: Then may I have it marked for identification?

The Court: It may be marked Defendants' Exhibit E for identification.

The Clerk: Defendants' Exhibit E for identification.

(The document referred to was marked Defendants' Exhibit E for identification.)

The Court: I notice it is 3:00 o'clock and I anticipate [86] I have some other business in chambers, so we will take our recess now. We will recess until 15 minutes after 3:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Beehler): I asked you one question, I believe, with respect to your knowledge of Vimcar possibly using photographs.

Did you know, also, that the instruction sheet which you prepared was to be used by purchasers of the hardware of Sturdee?

A. Not at the time it was made. I made the sheet in February.

(Testimony of Carvel Moore.)

Q. You knew that, however, a few months later, did you not?

A. That was strictly a dealing between Mr. Fowler and Vimcar, not myself. I didn't handle the sheets at all.

Q. Did you know that?

A. I knew of it later, yes.

Q. You said, too, I believe, that the photographs which you took and identified—I don't recall the exhibit numbers, but they were three in number.

A. 22-A, -B and -C.

Q. You said they were released in about February, 1948, am I correct?

A. No. August of 1949. [87]

Q. August of 1949. Were there not some photographs here which you took in 1948?

A. No, sir.

Q. Do you have any written records as to when you released those photographs?

A. Yes, through invoices.

Q. Do you have them here or are you testifying from memory?

A. No. I checked my invoices before this case came to court.

Q. What was the date when you first made a photograph of the Sturdee jamb type hardware?

A. The first photograph was made in February, 1949.

Q. The first photograph you ever made of the Sturdee jamb type hardware, when was that?

A. 1949, February.

(Testimony of Carvel Moore.)

Q. Do you have records to substantiate that?

A. Yes.

Q. Did you testify from memory as to that?

A. No. As I say, it was taken from the invoice records. That would be the only record I would have of when I took a photograph, is when I invoice the customer.

Q. Do you have the invoices here?

A. No, I don't have my file with me, no.

Q. Do you know who did Mr. Fowler's art work before [88] you began in February, 1949?

A. No.

Mr. Beehler: That's all.

Mr. Fulwider: I would like to ask one more question. [89]

\* \* \*

### SAM BAIRSTOW

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Fulwider: [92]

\* \* \*

Mr. Beehler: May I also answer the court's question about duplicating a piece of hardware? Plaintiff's counsel has hit it, I believe, when he said if we copied the ornamental features of a non-patented piece of merchandise, there might be some

(Testimony of Sam Bairstow.)

room for a charge of unfair competition. That I understand to be the law. [98]

Mr. Fulwider: I didn't say ornamental. I said non-functional in qualifying that.

The Court: Do you mean ornamental?

Mr. Fulwider: No, no. There is nothing ornamental about that.

The Court: There is nothing ornamental about this that I can see.

Mr. Fulwider: It doesn't look ornamental to me. [99]

\* \* \*

#### MORRIS HALOPOFF

called as a witness by and on behalf of the plaintiff, under Section 43(b), having been first duly sworn, was examined and testified as follows:

\* \* \*

#### Direct Examination

By Mr. Fulwider: [102]

\* \* \*

Q. And was it the hardware that is involved in this suit, this Olympic hardware, which is our Exhibit 5? I will show you Exhibit 5 here and ask you first if you can identify that as of your manufacture, and secondly, is that the hardware you had in your place of business, about March 1, when Mr. Fowler called on you?

A. Yes. [104]

\* \* \*

Q. Do you do any assembly before you ship it?



(Testimony of Morris Halopoff.)

A. We complete the whole job.

Q. You assemble it and box it?

A. Right. [105]

Q. Put instruction sheets in it? A. Yes.

Q. And ship it to Vimcar? A. Yes.

Q. A set like this? A. Yes.

\* \* \*

The Court: Did you make these sets from a model or did you make them from a diagram?

The Witness: Well, it has been taken from, I believe, three or four sets, and then some of the improvements I have to do myself with my boys.

Q. (By Mr. Fulwider): Would you speak up just a little bit? I am having trouble hearing you.

The Court: The sets you made then weren't copied from any one model, is that correct?

The Witness: Not from one model, no. It has been copied from about three models besides the improvements I made myself.

The Court: You made some improvements yourself?

The Witness: Yes, with my boys. [106]

Q. (By Mr. Fulwider): What three models did you copy in evolving the present Vimcar Olympic hardware?

A. Well, Tavart, Standard, and Sturdee.

Q. And you took, then, I assume, the best features of all; is that correct? A. Well, I have.

Mr. Fulwider: May I have that answer?

(The answer was read by the reporter.)

(Testimony of Morris Halopoff.)

Q. (By Mr. Fulwider): You mean you did?

A. Yes, I picked out the best features, yes.

Q. So the particular set you put out, in your opinion, then, combined the best features of Tavart, Standard, and Sturdee? A. That's right.

Q. Did you have a Tavart set in your plant prior to starting the manufacture of the present Olympic hardware, or did you go out and see a Tavart somewhere?

A. I have seen Tavarts somewhere.

Q. You didn't have one in your plant to assist you? A. Later, I did have.

Q. But not at the beginning when you started manufacture?

A. Well, at the time when I was getting ready to manufacture, I had all three sets. [107]

\* \* \*

Q. You had been making Standard previously?

A. That's right.

Q. And so then you bought a Tavart and a Sturdee? A. That's right.

Q. Did you buy an Olympic?

A. No. I asked Mr. Donner at the time where I could—if they had in mind what kind of set they wanted, and so he sent me over to Petco Products. I got a set off of there and I didn't think too much of it.

Q. How was it constructed? Did they manufacture it?

A. No. They are also a sales organization, the same as Vimcar.

(Testimony of Morris Halopoff.)

Q. What hardware was that, Petco?

A. Well, it was so complicated, I couldn't explain?

Q. Was it jamb hardware?

A. It was—You can't even call it jamb or pivot. It was, you might say, in between.

Q. Mr. Donner suggested you go over and look at that [108] as possibly something that he wanted?

A. He said that, and he says, "We have got a set right here." He said, "Ask Mr. Korse to give you a set." So I asked him and got a set from there, also. That was the time I found out it was similar to Sturdee.

Q. So he gave you a set of his Vimcar Olympic hardware, and it was then that you found out it was the same as Sturdee?

A. That's right.

Q. Then was it an Olympic set or one manufactured by Sturdee and sold under their own trade-mark that you copied?

A. Well, it was in a carton. I don't know. It said "Olympic."

Q. It said "Olympic" on it?

A. That's right.

Q. And it was your understanding that was made by Sturdee, but sold by Vimcar under that name?

A. I didn't know who it was made by.

Q. You didn't know that then. Your answer is in the affirmative?

A. No.

Q. With whom at Vimcar did you have your first conversation concerning manufacturing the hardware for them?

A. Mr. Donner.

(Testimony of Morris Halopoff.)

Q. Mr. Donner. He came out to your place and talked [109] to you?

A. Well, at the time when he came out there, I was out of town. When I came back from my trip, well, my boys told me that Mr. Donner wanted to see me, had his phone and everything, so I called him up and made an appointment with him at that time.

Q. Where had you gone out of town, just as a matter of curiosity?

A. I had been out of the state, in Oregon.

Q. In Oregon. What was the date of your return from that trip?

A. I can't remember.

Q. Can you give us any approximate date?

A. Maybe one of my boys here probably could. I think it was around about November or December.

Q. Of 1949?

A. 1949.

Q. What is Mr. Donner's position with the defendant Vimcar?

A. I don't know.

Q. Did you ever deal with Mr. Carter?

A. Well, I started to know Mr. Carter after we started manufacturing.

Q. You met him after you started manufacturing?

A. I mean the first order, when we took the first order. [110]

Q. As I recall your deposition, you testified that you met him a matter of weeks after you had had your first discussions with Mr. Donner.

A. Well, no, my first discussion was with Mr. Donner a few times before I even met Mr. Carter.



(Testimony of Morris Halopoff.)

Q. How early were those first discussions with Mr. Donner then?

A. It should be around about January, I [111] think, 1950.

\* \* \*

Q. Do you have any recollection as to when it was, having in mind that your first delivery, so far as you know, was to Vimcar in the first part of February?

A. Yes. Well, the first purchase order was February 7, 1950.

Q. February 7, 1950?

A. That's right.

\* \* \*

Q. Your best recollection now is what, then?

A. It should be around about in January, middle of January, 1950.

Q. That was the first time you saw Mr. Donner?

A. I believe it was.

Q. And where was that meeting held? [112]

A. At his office.

Q. What did he say to you?

A. Well, he told me, asked me if I was interested in manufacturing for him overhead hardware.

Q. And did you ask him what kind of overhead hardware he wanted?

A. Well, he wanted 8-inch clearance.

Q. Did he tell you that they were manufacturing hardware then? A. No.

Q. He didn't tell you anything about that?

A. He didn't say anything at that time.



(Testimony of Morris Halopoff.)

Q. And you didn't see any hardware around his place? A. No.

Q. How long did it take you to tool up? First, before we get into that, what did Mr. Donner ask you to do in that conversation?

A. I didn't quite get that.

Q. What was the result of the conversation, to shorten it up, what was the result of the conversation?

A. I was interested in manufacturing hardware if I could produce the right type that they were looking for.

Q. So he gave you some Vimcar hardware and told you to go over and look at the Vimcar hardware and design one for him, is that it? [113]

A. He didn't give me any.

Q. He didn't give you any Vimcar hardware?

A. He told me to go down to Petco to see their hardware, and also asked me to see Mr. Korse.

Q. To see Mr. Korse?

A. And get a set from him.

Q. So then you went to see Mr. Korse and he gave you a set of Vimcar hardware, Olympic hardware? A. That's right.

Q. Then did you have any other conversations with Mr. Donner? A. Not that moment.

Q. What did you do with the Vimcar hardware, the Olympic hardware? You took it with you, I assume? A. Took it to the shop.

Q. To your shop? A. Yes.

Q. What did you do with it?

(Testimony of Morris Halopoff.)

A. Opened it up.

Q. And looked at it?

A. Yes, and found out, why, it was the same as the Sturdee set. So I started working and making changes.

Q. You had previously examined a Sturdee set, then?

A. Well, I did get the Sturdee's and the Tavart's.

Q. You had gotten Tavart and Sturdee before you had [114] this conversation with Mr. Donner, this first conversation?

A. Oh, no, no.

Q. When?

A. After we made arrangements to make a set for Mr. Donner, to get the right kind of set that he was looking for, why, then I started looking for sets so I could make an 8-inch clearance.

Q. Then on that first conversation he neither gave you any Vimcar hardware or even told you that they were making hardware, is that correct?

A. That's right.

Q. And he recommended you go see Petco. Did he recommend any other place to go see hardware, to get some hardware?

A. No.

Q. All he wanted you to do was make 8-inch hardware?

A. That's right.

Q. Gave you no guides whatsoever as to how it was to work?

A. No.

Q. Did he tell you it was jamb hardware?

A. I knew it was jamb hardware when he wanted 8-inch clearance.

(Testimony of Morris Halopoff.)

Q. So as a result of that conversation, if I understand you correctly, then you went out and you bought a [115] Sturdee hardware and you bought a Tavart hardware, and you looked at the Petco hardware, is that correct?

A. That's right.

Q. Did you look at any other hardwares?

A. Yes, a few others on the doors.

Q. On doors. But you didn't buy any of those?

A. No.

Q. Then you had another conversation, I take it, with Mr. Donner. The one you were telling us about was not the first one, but a second one, is that right?

A. We had a few conversations after that.

Q. So this was a later conversation. About when would that be with respect to the first conversation?

A. I imagine about a week later.

Q. About a week later. What did you do? Did you tell Mr. Donner at that time as to whether you could supply him?

A. I didn't say anything about supplying. It was only just a matter of getting the right set. I told him that we were trying out different ways to get that 8-inch clearance.

Q. And was that conversation in his office or yours? A. At his office.

Q. So you didn't have anything to show him yet?

A. No.

Q. You just told him you were working on [116] it? A. That's right.

(Testimony of Morris Halopoff.)

Q. Did you tell him you had a Sturdee and a Tavart then?      A. No.

Q. You didn't tell him that?      A. No.

Q. Did you ask him for any ideas he had on how he would like to have his hardware made, other than the 8-inch hardware?

A. No. He was interested in 8-inch clearance.

Q. And that's all?      A. Yes.

Q. He didn't tell you anything at all that would lead you to suspect even that they were then selling garage hardware?      A. No.

Q. Vimcar?      A. No.

Q. And did you know that they were selling garage hardware?

A. Not until I got that first set from him.

Q. This is still a third conversation, then, I take it, when you got the set from Mr. Korse, or was it that second conversation?

A. It was in the second conversation, I think, I got [117] that set from Korse.

Q. So in the second conversation you told Mr. Donner that you didn't have anything to show him yet and he suggested you go down and see Mr. Korse, because he had some hardware that would be satisfactory, that's right, isn't it, if you could duplicate it?

A. You are asking me the same question over and over.

Q. No, it is not the same question.

Mr. Fulwider: Will you read the question, please?



(Testimony of Morris Halopoff.)

(Question read.)

Q. You can answer that yes or no.

A. I believe it is, yes.

Q. Then you did pick up a set from Korse and took that home with you?

A. Took it to the shop.

Q. And you compared that to the Sturdee set you had already bought?      A. That's right.

Q. And to the Tavart set that you had bought?

A. That's right.

Q. And you noticed that the Olympic set was the same as the Sturdee?      A. That's right.

Q. Did it occur to you that if Mr. Donner was satisfied with the Olympic set that he was selling, and it was the [118] same as the Sturdee set, with which you were familiar at the time, that perhaps the Sturdee set would be satisfactory to him?

A. Well, I made the set up. I didn't say anything to him. I made the set up and then showed him the set. I told him I had a few of them that I tried at the shop out there and——

Q. Now, which conversation is this? Is this the one you are just telling us about?

Mr. Fulwider: I am sorry it takes so long, your Honor, with this witness.

The Witness: I think about the third conversation.

Q. (By Mr. Fulwider): About the third conversation?      A. Yes, that's right.



(Testimony of Morris Halopoff.)

Q. How much later after the first conversation was that one?

A. It must have been about pretty close to two weeks.

Q. About two weeks. So you had first one conversation, and then a week later another one, and a week later another one. In the meantime, you had been experimenting, is that right?

A. That's right.

Q. Then you told him what? Did you show him the sample?

A. I showed him the sample and that was the time when [119] I met Mr. Carter.

Q. That was when you met Mr. Carter?

A. Yes.

Q. Then I assume the three of you sat down and talked it over, and you quoted him a price, and he said they would buy so many if you would make them, is that right?

A. That's right.

Q. To the best of your recollection, that was in January some time?

A. Some time early in January.

Q. How long did it take you to tool up to make those? How long a time elapsed between that and your production time?

A. Very short, about two weeks, probably sooner than that, because I had most of the dies of my own.

Q. You recall in your deposition in answer to a similar question, you said a month or maybe five or six weeks after you decided to manufacture them.

A. Well, it wasn't very long. I couldn't tell you

(Testimony of Morris Halopoff.)

exactly. I couldn't remember right up to the minute, you know.

Q. Have you done something or checked some records since the deposition so that you have a better remembrance now than you did when we took your deposition last month?

A. No. All I checked is when we started and when we [120] got the purchase order, and it was a few weeks before that.

Q. You received the purchase order February 7th, and did you make your first delivery February 7th?

A. The first delivery was on February 15.

The Court: Of 19 what?

The Witness: 1950.

Q. (By Mr. Fulwider): How much did your tooling cost you that you had to make for the Olympic hardware?

A. Well, I had most of my tooling, which I had been manufacturing for Standard. I don't believe it cost me over \$300 for the additional tooling. [121]

\* \* \*

Q. You took this set of Vimcar hardware home with you. How long did it take you to make up your mind that that might answer the problem Vimcar had for a good set of hardware?

A. Well, it took about a week and a half before I tried out a few different sets and made one set to show part of a sample.

Q. That is, you made it, after you got your Vimcar hardware, you still experimented and you made

(Testimony of Morris Halopoff.)

a set? Did [122] you make more than one experimental set?

A. In the shop I made about a half dozen of them, maybe more.

Q. Was that before or after you saw the Vimcar hardware?

A. There was a few of them before I seen Vimcar. I have forgot how many there were, and then after I ran into a Sturdee set, and then got Vimcar's, then I combined them all three together, besides the little changes we made ourselves.

The Court: May I ask a question?

Mr. Fulwider: Yes, your Honor.

The Court: What improvements did you make?

The Witness: The improvements we made, he has got the bushing, what we call for the main pivot there, is on a solid piece, and what we have is a bushing, reamed out more.

The Court: Can you show on the exhibit what the improvement was you say you made?

Mr. Fulwider: You just beat me to it by one question, your Honor.

Q. (By Mr. Fulwider): Here is the Olympic hardware. Will you point out to the court each and every improvement you made over the Sturdee previous Olympic hardware?

A. This here, right here, see. This is interchangeable, and the Sturdee is not interchangeable. They are riveted on this side here. It is all in one piece. [123]

(Testimony of Morris Halopoff.)

Q. You mean that they rivet their part to this arm?  
A. Yes.

Q. And you just bore a hole there——

A. This particular one here has no bearing in there or bushing. All ours got a bushing in there, a washer this way and a washer there, and also threaded to this here plate, making it have a lock washer and nut in back of it, so in case they have trouble here, they could interchange it in a short time. [124]

Q. It is just the same except you don't have the bushing?  
A. Yes, and——

Q. Then it is cheaper to do it without a bushing, isn't it?  
A. No.

Q. Isn't it?  
A. No, it is the same.

The Court: You were going to point out something else. What else was there?

The Witness: And this offset out here where they have it round.

The Court: You have got a straight line and they have a rounded offset.

The Witness: That is right. And then we have another two holes out here so that it could be used for lightweight doors, aluminum doors.

Q. (By Mr. Fulwider): Would you point out the bushing in here that you had reference to?

A. There is no bushing.

The Court: There is no bushing in that.

Q. (By Mr. Fulwider): This is Sturdee.

A. That is riveted out there, and then they have got this round here, and ours is straight.



(Testimony of Morris Halopoff.)

Q. Yours is offset by just bending it down? [125]

A. That's right.

Q. And theirs is done with some kind of a forming tool or on a machine?           A. I don't know.

Q. You say this cannot be taken apart then, is that it?

A. No, you have to chisel that off, grind it off.

Q. The difference between this and yours is that you can't unscrew the nut and take it apart?

A. Yes.

Q. What other difference did you point out, other than this difference in shape, and you say you had another hole?

A. Yes, two more holes out there.

Q. How many are on there?

A. This particular one hasn't. We added two more holes.

Q. This has five, is that right?

A. Yes, and all ours come out, have been coming out, with eight holes for some time.

Q. But the first ones you made had just the same number of holes as this?           A. Yes.

Q. If you lay this on top, are the holes spaced any differently, or do you know? They are spaced the same, aren't they?

A. The same, yes. [126]

Q. What are these little holes here for, this hole on the side?           A. Those are just nail holes.

Q. Nail holes?           A. Yes.

Q. What do you do, put them up temporarily first?



(Testimony of Morris Halopoff.)

A. Just for an adjustment, to get them in the proper place before they put the lag-bolts in.

Q. And there are similar nail holes here, aren't there?

A. Well, that doesn't make any difference, whether quarter-inch or three-sixteenths.

Q. But there are similar nail holes there?

A. Well, nail holes, yes.

Q. That's right, right adjacent to the slots.

A. Yes.

Q. Have you pointed out every difference to the Court between these two sets of hardware? Is there any other difference? A. I believe there isn't.

Q. Is there any difference in the dimensions? I believe these arms 12 are the same width, aren't they? A. Yes. [127]

\* \* \*

### Cross-Examination

By Mr. Beehler: [148]

\* \* \*

Q. Up until about January of 1950, what kind of product were you making in your plant there?

A. Up to January, 1950, we started to manufacture, also, some standard overhead hardware.

Q. I show you a circular, Mr. Halopoff, captioned "Standard Overhead Hardware"—the caption, rather, is "Standard Jamb Hardware for Overhead Doors"—

Mr. Beehler: I request that be marked defendant's next in order.

(Testimony of Morris Halopoff.)

The Court: It may be marked for identification Defendants' Exhibit F.

The Clerk: So marked, your Honor.

(The document referred to was marked Defendants' Exhibit F for identification.)

Q. (By Mr. Beehler): Is that the standard hardware that you were making at that time? [149]

A. Yes.

Q. Does that appear to be one of your circulars?

A. It was our circular.

Q. Standard Hardware's circular?

A. Yes.

Q. You were making the Standard Jamb Hardware sets for the Standard Hardware Company, is that correct? A. That's right.

Q. Was that the hardware that Mr. Fowler complained of as an infringement of his invention?

A. No.

Q. How long had you been manufacturing that particular hardware illustrated on the circular?

A. Approximately a year.

Q. That would be a year prior to January 1 of 1950, is that correct? A. That's right.

Q. You had, I presume, tooling and dies, and so forth, for that kind of hardware? A. Yes.

Q. Were they the same sort of tools and dies which you later used for the hardware which you made for Vimcar?

A. About 90 per cent of it.

Q. And that was jamb hardware?

(Testimony of Morris Halopoff.)

A. That's right. [150]

Q. What kinds of products other than garage door hardware do you now supply to Vimcar?

A. Oh, about four.

Q. Will you identify them, please, name them?

A. Nuts and bolts, washers, and also the hardware, overhead jamb hardware.

Mr. Beehler: I wish to offer in evidence the sheet just identified, or offered for identification, as Defendants' Exhibit F, as an exhibit in evidence.

The Court: It may be received and so marked.

The Clerk: So marked.

\* \* \*

### Redirect Examination

By Mr. Fulwider:

Q. I would like to ask you just a few questions about that exhibit. I won't be long. Are you still manufacturing this Standard hardware?

A. Not any more, no.

Q. When did you stop manufacturing it?

A. Oh, roughly, say about three months after.

Q. Three months after what?

A. After I got the purchase order, the first purchase [151] order from Vimcar.

Q. About three months after February 7, 1950, then?

A. That's right.

Q. How long did you make this hardware prior to that time?

A. Up to that time.

Q. I mean how many years prior to that had you manufactured it?

A. Well, about a year.

(Testimony of Morris Halopoff.)

Q. About a year?

A. Including three months, probably a little more than a year.

Q. But you started manufacturing this about a year prior to February, 1950, is that right?

A. Yes.

Q. So you started making it about the first of February, 1949, is that correct?

A. About that.

Q. Calling your attention to this Exhibit F, the cantilever arm or link is not connected to the side rail of the door, is it?

A. That's right. [152]

\* \* \*

Q. How do you adjust a door in this type hardware to [153] get aligned vertically when you install it?

A. The door should be in a vertical position and after you get your dimensions, what the instruction calls for, from the top of the door to here, and wherever this here places itself to the door, that is where it stays.

Q. In other words, you align the door by working this pivoted end, which we will call E, the lower end of the link C, up and down on the door until everything is lined up?

A. That's right.

Q. Referring to this one here where the door is in vertical position, that link is tied down here, isn't it?

A. Somewhere near there.

Q. That is, our point E is down here, and you move that up and down the door until the whole thing is straight; right?

A. Yes.

(Testimony of Morris Halopoff.)

Q. This circular says it is for a door 7 feet to 7 feet 6. Does it say anything on here about the head room?

A. Yes, 10-inch clearance—I mean 12½-inch.

Q. Plus door thickness, is that correct?

A. I believe it is.

Mr. Fulwider: That's all, your Honor. Have you anything else?

Mr. Beehler: No. [154]

\* \* \*

### VICTOR M. CARTER

called as a witness under Rule 43b by the plaintiff, having been first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Fulwider:

Q. Mr. Carter, you are president of the defendant Vimcar, are you not?

A. Vimcar Sales Corporation?

Q. Yes. A. Yes.

Q. You are the sole stockholder? A. Yes.

Q. Your wife is treasurer, is that correct?

A. Right. [155]

Q. The first purchase, in your deposition you stated that the first purchase of Fowler's hardware was July 12, 1949, is that correct?

A. If that is the date of record, that is correct.

Q. As far as I know, the date in your deposition is correct.



(Testimony of Victor M. Carter.)

The Court: What is that date? July what?

Mr. Fulwider: July 12, 1949, is the date when Vimcar gave its first purchase order to Fowler for Olympic hardware.

Q. In your deposition, you likewise state that the date of your last purchase from Mr. Fowler was April 28, 1950. Could you have also have made purchases in May, June, and July? Did you check the books yourself or did someone else?

A. No, I did not check them myself.

Q. Who supplied the dates for you to put in the deposition which you signed?

A. I believe Mr. Donner checked the dates.

Q. Mr. Donner checked the dates? A. Yes.

Q. And you relied on his ability when you signed it? A. Sure.

Q. I believe Mr. Beehler said yesterday that prior to your buying Fowler hardware, you sold Tavart hardware; is [156] that correct?

A. That's right.

Q. When did you start selling Tavart hardware, approximately?

A. I don't remember. I can get the date. I believe it was some time in 1947, but I am not sure.

Q. In 1947, you believe. Will you check on that date and let us have that information later?

A. Yes.

Q. When did you stop purchasing hardware from Tavart?

A. I don't remember the date, but some time

(Testimony of Victor M. Carter.)

within the period when we started buying from Mr. Fowler.

\* \* \*

Q. In 1949, did Vimcar have a catalog?

A. Yes.

Q. You always had a catalog? A. Yes.

Q. When was that catalog printed?

A. I can check the date for you. [157]

Q. Do you do it each year?

A. No exact pattern.

Q. I believe Mr. Beehler put in evidence a sheet from the 1948 catalog, and you will find out for me whether or not—well, I will ask you this question. When was the first catalog printed after 1948?

A. I will be glad to get that information.

Q. You will get that for me? A. Yes.

Q. Was the Tavart hardware sold by you under the Tavart name or under the name of Olympic?

A. I believe under the name of Tavart.

Q. You didn't start using Olympic until you started buying hardware from Fowler; correct?

A. I believe that is correct.

\* \* \*

Q. What means did you use to explain to your customers that this Olympic hardware that was made by Sturdee was different in some respects from Tavart?

A. Well, we had literature on the Olympic hardware, [158] and our salesmen took orders on the Olympic hardware instead of on Tavart.

(Testimony of Victor M. Carter.)

Q. Did you continue to sell any Tavart after you had started selling Olympic?

A. We did not buy any from Tavart, but if we had any in stock, we probably sold those.

Q. You sold what you had left? A. Yes.

Q. You don't know, then, as a matter of fact, what particular means were taken to advise the trade that you changed from Tavart style to Sturdee style?

A. I believe in our catalog we had a Tavart set in one catalog and an Olympic set in another catalog.

Q. Did you tell any of them that it was made by a different manufacturer, different source? In other words, people were familiar with the Tavart you were selling. What did you tell them about the source of Olympic, as to who made that?

Mr. Beehler: I object to that as immaterial. Whether Olympic was sold under its own name, what difference does it make?

The Court: What difference does it make whether you notified your customers or not? If you go into a service station, you don't say what kind of gasoline is this. When you ask for door hardware, you don't usually specify a certain [159] kind.

Mr. Fulwider: I would like to know, if I may, whether or not he did. If he didn't, that's all that there is to that.

The Court: What difference does it make whether he did or didn't? The customers are not complaining.

(Testimony of Victor M. Carter.)

Mr. Fulwider: Here is a change from one style hardware to another, and I just wondered, as a matter of fact, what his business practice was about letting people know.

The Court: I don't know whether it was a change from one style hardware to another. It was a change of name. It seems to me most of these sets are similar to a great extent.

Mr. Fulwider: They are all similar to the extent they accomplish the same purpose of moving a door up and down.

\* \* \*

The Court: This Standard set, is that in prior art, the Standard set?

Mr. Fulwider: Is that part of prior art?

The Court: Yes, is it prior art?

Mr. Fulwider: Not as far as the present testimony goes.

The Court: I am asking you. You know the Standard set. [160]

Mr. Fulwider: I don't know, to tell the truth. I rather think it is. Let me modify it. I don't know whether Standard made it more than a year prior, but I know that kind of stuff made by somebody else was made long prior to ours.

Mr. Beehler: According to Mr. Fowler's deposition, that was made by Mr. Fowler in 1942.

Mr. Fulwider: I was going to say that kind of hardware was sold. Whether Standard was or not, I don't know.

The Court: I have been comparing the diagram

(Testimony of Victor M. Carter.)

in Standard with the diagram in the patent, and other than making the bar in two pieces, the only thing that has been done is taking that bar, which is called 12 in your patent—I will take that back—the bar which is called 14 in your patent, which used to be attached to the door, and now it is attached to the iron.

Mr. Fulwider: The side rail.

The Court: The iron which is 13.

Mr. Fulwider: The side rail.

The Court: Yes, the side rail. That is the only thing that has been done.

Mr. Fulwider: The arm itself is different.

The Court: The arm is different?

Mr. Fulwider: Yes.

The Court: What I am trying to get at is, do you think there is anything patentable because you have taken it off the [161] door and attached it to the side rail?

Mr. Fulwider: I think the two things together, the principal novelty, of course, in this kind of hardware being the construction of the link itself, that construction and fastening it to the side rail.

The Court: Let's forget about the fact that you cut it in two and made it two pieces instead of one, and consider only for the purpose of this argument that in the Standard it was attached to the door.

Mr. Fulwider: Right.

The Court: Under the patent, you extended the side rail and attached it to the side rail.

Mr. Fulwider: Yes.



(Testimony of Victor M. Carter.)

The Court: Do you think that is patentable in itself?

Mr. Fulwider: No, we don't claim that, your Honor.

The Court: We are really coming down to this question of severing this arm and making it in two pieces instead of one. [162]

\* \* \*

The Court: All these patents were designed, or all these structures were designed for the raising and lowering of an overhead door.

Mr. Fulwider: That's right.

The Court: I assume they were all designed so as to make the raising and lowering of the door easier.

Mr. Fulwider: Yes, foolproof.

The Court: Doors are pretty heavy, and you have to work out some sort of scheme to compensate for the weight. They all do it, I presume, by a spring. Some may do it by counterbalance, but most of them are by springs, aren't they?

Mr. Fulwider: Yes. [163]

\* \* \*

The Court: One of the witnesses yesterday testified after the top had been attached to the side rail, then they compensated by a slot, and then you come along with your patent in which you attempt to cut the rod in two and compensate it in the middle rather than at the end.

Mr. Fulwider: That is correct. The Patent

(Testimony of Victor M. Carter.)

Office gave us a patent on that, and I think they are right.

The Court: We have got three steps, haven't we? The first one was the Standard step where it was nailed to the door itself.

Mr. Fulwider: Right.

The Court: Then the first improvement was to put it on the rail, attach it to the rail, make a permanent attachment to the rail. The first compensation was the slot in the free end.

Mr. Fulwider: Probably.

The Court: Then the next step was to attach it permanently at the free end and cut the bar in two and make the compensation in the middle. [165]

\* \* \*

The Court: Do you know of any case in the patent law, not related to this sort of hardware on overhead doors or garage [167] doors, but on machinery, where there is a rod or a bar and somebody decided that instead of using one bar, you could get a better result by using two bars, and they cut it in two? Can you give me any case where the courts have sustained that contention?

Mr. Fulwider: Yes, I think I can. I haven't read the Paper Bag case for some time.

The Court: I read the Paper Bag case.

Mr. Fulwider: I would like to read that case again. I lost a case on that Paper Bag case once before Judge Mathes. On the strength of that case, he held this patent, which was somewhat broader—

(Testimony of Victor M. Carter.)

I was on the other side then, for the defendant, and I lost on the strength of the Paper Bag case, but I haven't read it, as I say, for some time. It was a patent that didn't have any more novelty than this thing.

The Court: I don't know whether it is invention to take a rod or a bar or driving shaft and make it in two parts rather than in one.

Mr. Fulwider: It isn't stated that broadly, your Honor.

The Court: It does exactly the same thing. [168]

\* \* \*

#### Cross-Examination

By Mr. Beehler:

Q. Prior to the marketing by you of the Tavart garage door hardware, did you also manufacture other garage door hardware?

A. We distribute other garage door hardware.

Q. I should say distributed. They were overhead type, too?

A. Yes.

Q. Do you recall about how long it may have been before you were taking on the Tavart line that you distributed the other type?

A. I think we started some time in 1945 or 1946.

Q. After you undertook to market the Tavart type, you then changed to Fowler, according to your direct testimony. What occasioned the shift from Tavart to Fowler?

A. Well, our distribution policy didn't seem to tie in with Tavart's policy. We conflicted in some

(Testimony of Victor M. Carter.)

of the territories with their jobbers and their distributors, and they, therefore, did not want to continue selling us in the certain [171] territory. I believe in the eastern states it would not have conflicted with their sales. We preferred the Tavart set, because the customers always thought very well of the Tavart, but Tavart Company did not want to sell us any more.

Q. It wasn't your choice, then, that you had to shift from Tavart to someone else?

A. That's right, it was not.

Q. When you distributed the Fowler hardware, it was under your name of Olympic, is that correct?

A. That's right.

Q. And that was with the consent of Fowler and Sturdee at all times?           A. Definitely.

Q. You used the trade name Olympic on your whole line of products?

A. Yes, we do. We own the name Olympic. That is our trademark. [172]

\* \* \*

HARRY N. WINCHEL

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Beehler:

\* \* \*

Q. Will you tell the court your business?

(Testimony of Harry N. Winchel.)

A. Manufacturing overhead garage door hardware and building garage doors.

Q. What is your business name?

A. Winchel Manufacturing Company. [174]

Q. That is located where?

A. 116 North Pomona in Brea.

Q. How long have you been in the business of manufacturing garage door hardware?

A. I think I started in September, 1945.

Mr. Fulwider: 1945 or 1935?

The Witness: 1945.

Q. (By Mr. Beehler): When you first began the manufacture of garage door hardware, what kind did you make?

A. I made a jamb type and a track type.

Q. The jamb type was of what general description? Will you describe it for the court?

A. Well, what do you mean? Just a regular jamb type hardware.

Mr. Beehler: May I see the little red printed circular of Standard?

Q. I will show you, Mr. Winchel, Defendants' Exhibit F, which pictures a type of jamb hardware. Will you please refer to that exhibit and tell us whether or not the hardware you manufactured in 1945 corresponded in any way to that? You might use those numbers on the exhibit, if you would like to refer to something specifically in describing it.

A. Well, I have my own literature.

Q. Do you have your literature here? [175]

A. Yes. I would rather present it.



(Testimony of Harry N. Winchel.)

Q. Would you produce that for us, a copy of that literature?      A. (Witness complying.)

Q. Do you have before you a piece of your literature?      A. Yes, sir.

Q. Will you tell us when that piece of literature was printed?

A. I couldn't say as to that, no. I don't see any date on it. I couldn't say.

Q. With respect to the literature which you produced here, is that the type of hardware pictured on the literature which you were manufacturing in 1945?      A. That is correct.

The Court: Maybe we'd better have that marked for identification so we can refer to it. Mark it Defendants' Exhibit G.

The Clerk: Defendants' Exhibit G for identification, so marked.

(The document referred to was marked Defendants' Exhibit G for identification.)

Q. (By Mr. Beehler): I direct the witness' attention to the drawing of the hardware on page 3 of the exhibit and also on page 4, and call attention to the presence of a jamb plate which, if I may, I will mark with the numeral 10, and [176] an angle iron, rail plate—is that what you term it?

A. Angle iron.

Q. No. 11. A power arm 12, and a link 13—

A. Cantilever.

Q. Cantilever arm, you call it?

A. Yes, sir.

(Testimony of Harry N. Winchel.)

Q. A short piece of angle iron 14?

A. That's right.

Q. And where I draw this pencil line, which I will label 15, will you identify that part of the construction of your device?

A. That is a slot hole about, oh, I would say an inch long,  $\frac{3}{8}$  wide. This has a bolt to the cantilever arm there, jamb nut, and a nut on the other side of the bracket.

Q. What was the purpose of the slotted hole?

A. That was for a stop and for adjustment.

Q. When you say for adjustment, what adjustment was effected by use of that slot?

A. Well, that would throw—when your jambs wasn't quite even in the back, you could bring it in the width of that, and let this master arm so it would fall in that far. You see, if you put this, you would have adjustment there to let this arm swing in or out if the door wasn't the same in the back.

Q. If the jamb on the garage was a little out of [177] alignment, you mean? A. Yes, sir.

Q. Then you could push the door against the jamb by moving the end of the cantilever arm in the slot; is that correct?

A. Yes. You could put this against the door and lag screw it onto the door, and then you push this.

Q. By "this," you are referring to the rail plate?

A. The rail plate, and then you shove this C or

(Testimony of Harry N. Winchel.)

15, as you have marked it, up against this, and then lag screw this onto the door.

Q. By lag screw, you refer to the part 14?

A. Yes. That would act as a stop for the door when it was up and you wouldn't have to touch the hardware.

Q. Thank you. How long did you continue to make hardware of that variety?

A. I am still making it.

Q. Do you sell that hardware in any great quantity?

A. Well, that is a de luxe type of hardware. It isn't sold in large quantities.

Q. Did you sell any of that type hardware to Stevens and Thuet in Long Beach?

A. Yes, we have.

Q. Do you recall when you first sold that hardware to Stevens and Thuet, when that occurred, your first sale? [178]

A. No, I can't. It was back in 1945 or 1946. I can't say just exactly. They started about the same time we did and I can't pinpoint a day.

Q. Was Mr. Berger working there at that time?

A. No, he wasn't.

Q. Subsequent to your manufacture of this particular style of jamb hardware, did you then make a change to some other style of jamb type hardware?

A. Yes. We have made different changes as we have gone along.

Q. Do you have any literature which illustrates

(Testimony of Harry N. Winchel.)

what the next variety of jamb hardware was?

A. Yes.

\* \* \*

Q. (By Mr. Beehler): This, then, is a picture of [179] recent printing of the same hardware that you manufactured in 1945; is that correct?

A. Yes. That was a drawing, I imagine around, oh, I would say 1946, 1947. I had that drawn by a draftsman.

Q. A drawing from which the cut was made was drawn in 1946 or 1947?

A. Some place in there. I can't specify just the date.

Mr. Beehler: I offer in evidence, therefore, in the form identified here the exhibit referred to as Exhibit G.

The Court: It may be received and marked Exhibit G.

\* \* \*

Q. (By Mr. Beehler): Mr. Winchel, you were about to show us another piece of literature.

A. These are newer. Is this what you want? I got another one, too.

Mr. Fulwider: Do you by any chance have duplicate copies so I can have a set?

The Witness: You can have these.

Mr. Fulwider: They will need these in court here. Do you have any extras?

The Witness: No, I don't. I just brought one of each kind that I could find. [180]

Q. (By Mr. Beehler): Mr. Winchel, among

(Testimony of Harry N. Winchel.)

these pieces of literature which you have produced, will you select the piece of literature which illustrates the type of jamb hardware which you began to manufacture after you made the first change from that illustrated in the first circular that you produced?      A. After I—state that again.

Q. You showed us a circular, Defendants' Exhibit G, which showed a certain type of hardware which you manufactured, you say, in about 1945.

A. Yes, sir.

Q. Then subsequent to that you made some slightly different, but still jamb type hardware. Will you select from among the pieces of literature the one that shows that picture of the first change, let us say, that you might have made?

A. I imagine this is about our first change right there. Well, we still manufacture this type.

Q. I understand. What you are now showing me was in addition, correct?      A. Yes.

Mr. Beehler: May we have this piece of literature marked as a defendants' exhibit for identification?

The Court: It may be marked Defendants' Exhibit H for identification only. [181]

The Clerk: So marked.

(The document referred to was marked Defendants' Exhibit H for identification.)

Q. (By Mr. Beehler): I am now referring, Mr. Winchel, to Exhibit H for identification. Will you point out the features on that item of jamb hard-



(Testimony of Harry N. Winchel.)

ware which are different from the one that you described first?

A. Well, this is one piece of angle iron where the cantilever hooks on.

Q. May I label that with a number for the purpose of the record? We can call this the Alumi-Door folder. I put a number 11 on the piece you described as the single angle iron. Perhaps, if I may suggest, you had on this, also, a jamb plate 10; correct? A. That's right.

Q. And you had on this piece, also, a power arm 12; is that correct? A. That's right.

Q. And you also had on this piece a cantilever arm, or at least a section of cantilever arm 13 prime; is that correct? A. Yes.

Q. And on this particular embodiment you had a second section of cantilever arm which I will give the number 13 double prime; is that correct? [182]

A. Yes.

Q. With a pivot joint 20 between them?

A. That's right.

Q. Now, will you describe briefly the action of this type of jamb hardware?

A. That type hardware was designed for a low clearance set primarily.

Q. And by low clearance, you mean, do you not, that— A. It cut down the head room.

Q. On the head room, that is the amount of room behind the top of the front of the door at the point I mark X? A. Yes.

(Testimony of Harry N. Winchel.)

Q. That is what you mean when you say low clearance?  
A. That's right.

Q. Or clearance?  
A. Yes.

Q. Then this particular design hardware was designed to accommodate the door to a lower clearance than the first type hardware could accommodate; is that correct?  
A. Yes, that's right.

Q. Tell us, Mr. Winchel, when you first manufactured that variety of hardware.

A. Well, I couldn't say for sure. I think it was around '47.

Q. 1947, the early part of 1947, could you [183] say?

A. Well, I wouldn't say whether it was early or late.

Q. Is there anything that might suggest itself so that you could fix a date in 1947?

A. No. It was just trial and error. We accomplished this set and it never was a success, so we quit making it.

Q. But, in any event, it was in 1947?

A. I imagine it was.

Q. And you sold them commercially at that time?  
A. Not very much, no.

Q. You sold one commercially?

A. Yes. I sold a few.

Mr. Beehler: May this exhibit for identification H be received in evidence?

The Court: It may be received and marked Exhibit H in evidence.

The Clerk: So marked.

(Testimony of Harry N. Winchel.)

(The document referred to was received in evidence and marked Defendants' Exhibit H.)

Q. (By Mr. Beehler): Now, Mr. Winchel, will you pick from these various illustrations you have produced another, perhaps the next change that you made in jamb type hardware?

A. You mean another set?

Q. Another set different from the two we have referred to before. [184]

A. Well, I imagine this is about the—well, this is about the same set as that other one except this was made for Butler Building. It was made for one purpose only and that was for the jamb there, you see, the tapered jamb.

Q. You are now referring to——

The Court: Let's mark that.

Q. (By Mr. Beehler): This is an instruction sheet; is that correct?

A. That is an instruction sheet for that one particular type hardware we made for Butler Building.

Mr. Beehler: May this be marked for identification then?

The Court: It may be marked for identification only as Exhibit I.

The Clerk: So marked.

(The document referred to was marked Defendants' Exhibit I for identification.)

Q. (By Mr. Beehler): Tell us, Mr. Winchel,

(Testimony of Harry N. Winchel.)

when you first made the variety of hardware pictured on Exhibit I?

A. Well, that is hard to say, too.

Q. As nearly as you can set the date.

A. It was in the latter part of 1947 and the first part of 1948.

Q. You said, did you not, that this was made and sold to Butler—what was the name of the company? [185]

A. Well, it was for Butler Buildings. We sold it to Stevens and Thuet Company.

Q. It was, in any event, sold to Stevens and Thuet? A. Yes.

Q. That was during 1947?

A. I believe that is correct. It might have been the first part of 1948.

Q. Will you describe the adjustment, if any, that is present on this type hardware in Exhibit I for identification? A. What's that, now?

Q. How that can be adjusted, if there is an adjustment for it.

A. There is an adjustment there.

Q. You are referring to the slot adjacent the point G on the drawing? A. Yes.

Q. What did that do?

A. It is adjusted there at the spring.

Q. You are referring to several holes in the upper end of the power arm?

A. Yes, and it can be adjusted down here.

Q. You are referring now to the S hook and a piece of chain? A. Yes. [186]

(Testimony of Harry N. Winchel.)

Q. With respect to the adjustment at the point G, what that accomplishes?

A. That throws the bottom of the door in or out. Well, that—on that particular hardware, that is about the only good it did.

Q. You mean then if the door were hung in the door opening, and if it were hung a little off vertical position, it could be straightened in a vertical position by manipulating the adjustment G; is that correct?

A. That is correct.

Q. That adjustment then was to plumb the door? Do I use the term correctly?

A. Well, yes, to plumb the door, you would say.

Q. One thing more. Well, may I ask this, Mr. Winchel, will you just describe briefly what a mechanic has to do when he is going to hang a garage door with this particular kind of hardware shown in Exhibit I?

A. Well, you would put your bracket on a certain distance down from the top for your action of the door.

Q. That is the bracket we have called the jamb plate?

A. Yes, the jamb plate. Then you would throw this angle iron against the door and you would have your door plumb.

Q. You are now referring to the angle iron B; is that correct? [187]

A. Yes. Then wherever that hit the door, you would bolt it there.

Q. Do you bolt it on immediately?



(Testimony of Harry N. Winchel.)

A. Well, if it is plumb and against the door, you bolt it right on.

Q. And then the next step would be what?

A. Raise it up and put your spring on.

Q. You put the spring on when the door is in raised position, horizontal position, full open position?

A. Yes, full open position.

Q. Then should you lower the door and find it not quite fitting the jamb in all respects, is it then possible to use the adjustment at G to change it slightly?

A. Very slightly on that one particular type of a door. It would be very slightly. You couldn't move it over an inch.

Q. But moving it an inch, you mean that the movement of the door would be an inch either way?

A. The bottom of the door, you could either throw it in or out.

Q. In or out an inch?           A. Yes.

Q. Would it be possible to throw it out more than an inch by making the slot G longer?

A. Well, I never tried that. I don't know. We already [188] had the bracket made and I just used that type bracket.

Mr. Beehler: I offer in evidence this Exhibit I, therefore, as Defendants' Exhibit I.

The Court: It may be received and marked Exhibit I in evidence.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendants' Exhibit I.)

(Testimony of Harry N. Winchel.)

Mr. Fulwider: There is no testimony as to when this was printed, is there?

Q. (By Mr. Beehler): Do you know when this was printed? A. No, I do not.

Q. Among the literature that remains here, Mr. Winchel, will you pick one that illustrates the next variety of jamb type hardware you manufactured which may be different from the other three we have talked about?

A. Well, it is the same type of hardware.

Q. Referring just for the moment to this piece of literature captioned "Installation Instructions for Overhead Garage Door Hardware"—

Mr. Beehler: May I suggest this be marked for identification?

The Court: It may be marked Exhibit J for identification.

The Court: J, your Honor. [189]

Q. (By Mr. Beehler): Referring in Exhibit J to the illustration identified as figure 3, which pictures a type of jamb type hardware, will you tell us about when you first began manufacture of that item?

A. You mean—I always had been manufacturing that item ever since I started.

Q. May I make this suggestion, the figure 3 of Exhibit J shows, among other things, a plate, which I will mark with a character 25. I believe that is called a gusset plate—is that the right name for it?

A. Well, I guess it is.

(Testimony of Harry N. Winchel.)

Q. Will you tell us when you first used that piece of metal on a jamb type hardware?

A. Well, that's hard to say.

Q. As nearly as you can set the date.

A. I would say in the latter part of 1948.

Q. Latter part of 1948. Were you then manufacturing that kind of hardware for commercial distribution?

A. Yes.

Q. Referring particularly to the gusset plate 25, and may I also call your attention to figure 4 in connection with figure 3, will you tell us the purpose and operation of what are apparently slots, but which I will in any event indicate by the character 26?

A. You mean the character of those? [190]

Q. What were those slots for?

A. Those slots were for adjustment.

Q. By adjustment, you mean adjustment of the verticality of the line?

A. That is correct.

Q. Do you recall or do you know how much of an adjustment you can get at the bottom of a door by manipulating that adjustment at the gusset plate?

A. No, I do not. I wouldn't say.

Q. Would it be more than the inch you mentioned in connection with one of the other pieces?

A. An inch either way is quite a bit.

Q. An inch either way is two inches in all.

A. Yes.

Q. If it were two inches in all, would that satisfy the average commercial requirement?

(Testimony of Harry N. Winchel.)

A. Well, I don't know about that. I imagine it would. We sell a lot of them.

Q. You are satisfied in any event from your point of view that it is enough?

A. The customers are satisfied, I guess.

Q. If it were necessary to adjust it to a greater extent than an inch either way, could that be accomplished by making the slots in 26 longer?

A. Well, not without making your cantilever arm [191] longer.

Q. The length of the slots then that you have chosen are about the limit that you can make with that specific length of cantilever?

A. That is correct.

Q. Did you, Mr. Winchel, sell any of this particular variety of jamb type hardware to Stevens and Thuet?

A. That is where we started. We started selling to Stevens and Thuet.

Q. Is this the first kind of hardware you sold to them, or is this a kind you sold when you first sold to Stevens and Thuet?           A. No, sir.

Q. It is not?           A. No, sir.

Q. But they are the first purchasers of your hardware of this kind; is that correct?

A. I believe they are.

Q. Do you have any records here which would indicate when the first sale was made to Stevens and Thuet of this kind of hardware?

A. No, not exactly.

(Testimony of Harry N. Winchel.)

Q. Will you give us a date as nearly as you can from your records?

A. That would be hard to say just when it was first sold. [192]

Q. Was it as early as the summer of 1948?

A. Well, I couldn't say. Just in the course of events, we kept working the hardware out and manufacturing different kinds until we hit upon this one, so I couldn't say just exactly when it was.

Q. Do you have any particular catalog number or identity for this hardware?

A. Well, we call that LO 9 type, which means it takes about 9 inches of head room.

Q. Is LO 9 used by you only for this particular kind?

A. I believe it is. The LO, I don't know if anybody else uses it.

Q. But as far as you are concerned, you don't use LO on some of the other hardware you talk about here; is that right?

A. Well, I don't know. Could I see those a minute?

Q. Surely.

A. No, we didn't call this—I guess we just give it a name when we printed the literature.

Q. Do you have the date of the printing of this particular literature in mind?      A. No.

Q. Referring again to the variety of hardware shown [193] in figure 3, do you recall when you first built that design in your plant?

A. With this gusset plate on it?



(Testimony of Harry N. Winchel.)

Q. With the gusset plate, yes.

A. No, I couldn't say just exactly when it was. We had been experimenting around for a long time.

Q. For a long time. Will you say a year, two years?

A. Oh, no, I wouldn't say that. It would be months.

Q. When you were working on this design, you mean then that it was a matter of months that you were working on a piece of jamb hardware which had a gusset plate on it?

A. Well, we keep experimenting all the time on different types of hardware and working it out by trial and error method.

Q. When you first made hardware with a gusset plate, did you put some up in your plant to try it out?

A. Well, yes, we always try it out before we put it out.

Q. Did Mr. Barnhardt help you with it?

A. Yes.

Q. Mr. Barnhardt knew, then, as well as you, about this kind of hardware when you first made it; is that correct?      A. That's right.

Q. Did Stevens and Thuet or anyone there know about [194] it before they made their first purchase?

A. Well, we sold them this other type here. Then we changed over and used this, which is about the same, except we put it on an adjustable—I mean a gusset plate there, which we had to make a differ-

(Testimony of Harry N. Winchel.)

ent design here to compensate for the adjustment. We couldn't put a narrow piece there where it took a wide piece.

Q. The change, then, from the hardware, Alumi-Door, Exhibit H, to the hardware of Exhibit J, was a change from the piece which I labeled 13 double prime to the gusset plate which I labeled 25; that is correct?

A. Except for the bracket. This is a different bracket than this one, to where we put this cantilever arm back in this hole here. Instead of having that there, we put it back there.

Q. Is that what you would call a short cantilever type?

A. Short? I don't know. It is shorter than this other type I manufacture.

Q. By the "other type" you are now referring to Exhibit G. Is there any advantage in the shorter type over the longer type?

A. It cuts down the headroom.

Q. Is there any advantage in packing if it is shorter?

A. No. They both fit in the same size [195] carton.

Q. The cutting down of the headroom is equally true of both Exhibit H and Exhibit J; is that correct? A. That's right.

The Court: Do you want Exhibit J in evidence?

Mr. Beehler: If you please.

The Court: It may be received and marked Exhibit J in evidence. [196]

(Testimony of Harry N. Winchel.)

\* \* \*

Q. (By Mr. Beehler): Mr. Winchel, were you ever charged by Mr. Fowler with patent infringement of his patent?

A. No. I don't know whether you would call it charged or not.

Q. Did he ever send you a notice of infringement?  
A. Yes, he did.

Q. You say yes, he did? A. Yes, he did.

Q. When did you receive that?

A. I don't remember.

Q. Was it a year ago, as much as a year ago?

A. Just about a year ago.

Q. When you were charged with infringement, then did you cease manufacture, or what did you do in response to that [200] charge of infringement?

Mr. Fulwider: Object to that, your Honor. I can't see that that has anything to do with this case.

The Witness: What was that again? Will you read that?

(Question read.)

The Witness: Well, we seen a lawyer and had a talk.

Q. (By Mr. Beehler): Did you continue manufacturing after that? A. Yes, we did.

Q. Are you now under a license from Fowler?

A. No, I am not.

Q. You are still manufacturing the same items

(Testimony of Harry N. Winchel.)

now that you were when you were charged with infringement?      A. Yes, sir.

Q. Do you have any understanding of any kind with Mr. Fowler about your continuing to manufacture, that you might not class as a license?

A. Well, I wasn't there at the meeting they had with the lawyer, and so forth, so I couldn't say.

Q. Who was present at the meeting?

A. My partner.

Q. His name is what?

A. Marvin Barnhardt.

Q. Who else was present?

A. The lawyers. [201]

Q. I beg your pardon?      A. The lawyers.

Q. Who were the lawyers, do you know?

A. Our lawyer was Mr. Horall of Santa Monica.

Q. He is a patent lawyer, is he?

A. Yes, sir.

Q. The other lawyers present, who were they?

A. It was Mr. Fowler's representative. I don't know.

Q. Was that Mr. Smyth?

A. Something like that.

Q. Were there any other individuals present?

A. Not that I have any recollection of.

Q. Do you know Mr. Dave Atkinson, whether he was there?      A. He might have been.

The Court: Will you tell me why this is material?

Mr. Beehler: Chiefly, your Honor, to determine—

(Testimony of Harry N. Winchel.)

The Court: I let you go ahead to establish whether or not he was a licensee and he says he is not a licensee. What difference does it make who was there and what the names of the lawyers were? Of course, there was no objection.

Mr. Fulwider: I should have objected.

The Court: I don't know why it is material.

Mr. Beehler: Well, I guess it isn't material, so I will stop. [202]

Q. (By Mr. Beehler): Tell me, Mr. Winchel, whose idea was it to slot the lever arm where the gusset plate attaches to get that adjustment?

Mr. Fulwider: May I ask what lever arm you are talking about?

Mr. Beehler: Well, we'd better refer to one of these exhibits, the last in order.

Q. As illustrated in figures 3 and 4 of Exhibit J, whose idea was it to slot the angle iron where the gusset plate attaches?

A. Attaches to what?

Q. Where the gusset plate attaches to the angle iron.

A. Well, that was worked out by trial and error method, the same as all our ideas.

Q. That was worked out by you?

A. By Mr. Barnhardt and myself.

Q. By Mr. Barnhardt and yourself in your shop? A. Yes, that's right.

Q. That, I believe you told us this morning, was in 1947 or in 1948?



(Testimony of Harry N. Winchel.)

A. I don't remember just exactly, but in 1948, I think, sometime. [203]

\* \* \*

The Clerk: Defendants' Exhibit L for identification, so marked.

(The photograph referred to was marked Defendants' Exhibit L for identification.)

Q. (By Mr. Beehler): Do you recognize that particular piece of jamb hardware as being yours?

A. Yes, that is ours.

Q. Do you recognize the installation? Do you know where that is? A. No, I don't.

Q. Can you tell from the construction of the hardware as pictured there when you manufactured it? A. No. [206]

Q. May I call your attention to the picture, pointing out that there is a gusset plate, as we have termed it, that there are slots at the connection between the gusset plate and the angle iron, and also that there is a transverse slot where the link or lever arm connects to the jamb plate? Does the fact that there is that combination of slots on the piece of jamb hardware suggest anything to you about when you may have made it?

A. The only one that would be different is this here with this triangular piece.

Q. Do you recall having manufactured a piece such as this where there was a slot at both ends of the link connection? A. Yes, I remember.

Q. Do you remember about when that was?

(Testimony of Harry N. Winchel.)

A. Well, it could be any time from the latter part of 1948 to the middle of 1948, I don't know, to the present time.

Q. Did you make a piece of jamb hardware like that in the middle of 1948?

A. Well, I couldn't say whether it was the middle or the end. I would say it was around 1948 some place, the first of 1949. I don't know just offhand.

Q. Do you recall having sold pieces of that particular kind to Stevens and Thuet? [207]

A. Oh, yes. We sell lots to them.

Mr. Beehler: I will leave this as an exhibit for identification until we can identify it further.

\* \* \*

### Cross-Examination

By Mr. Fulwider:

Q. Mr. Winchel, calling your attention to the first [208] folder that you discussed, Exhibit G, which shows a little horizontal slot here at C, as I understand it, the function of the bolt which is in the slot is to act as a stop for this power arm, is it not? A. Stop for that, yes.

Q. And you can adjust the bolt, thereby adjusting the stopping position? A. That's right.

Q. Do you call that a door stop?

A. Well, we call that a stop or adjustment. I don't know which you call it.

Q. That is its main function, as I understand it.

A. The main function?

(Testimony of Harry N. Winchel.)

Q. Yes, of the bolt there, is to act as a stop for that arm.           A. An adjustment, yes.

Q. In this type hardware where the end 14 is not connected to the side plate 11, the way the door is positioned for vertical alignment is to line up the door and then nail or bolt this bracket 14 in place, is it not?           A. That's right.

Q. And then once that is bolted in place, no further substantial adjustment of the door in the vertical angle can be made, if I understand correct?

A. There can be a little adjustment there, not much. [209] You can move this back and forth there just in that little slot and get a little adjustment.

Q. By moving the bolt and slot C, you get a little adjustment, although actually that is almost a horizontal movement, isn't it?           A. Yes.

Q. At the upper end there?           A. Yes.

Q. This being fastened to the door and this rod 13 is pivoted at 14, is it not?           A. Yes.

Q. As I understand it, you started making this hardware, your de luxe, Exhibit G, in 1945. That was your first hardware, wasn't it, in 1945?

A. Yes, sir.

Q. And you are still manufacturing and selling some?           A. That's right.

Q. Have you ever run any experiments to see just how much of an adjustment you can get with this little horizontal slot at C? You say an inch. I am wondering if you have ever actually tried it out to see if you get as much as an inch even.

(Testimony of Harry N. Winchel.)

A. Well, just on the doors we have had hung. You mean to throw the bottom of the door or the top of the door?

Q. Yes, to throw the angle of the door, to throw the [210] bottom or the top.

A. I guess you get about an inch.

Q. Now, referring to Exhibit H, which is the Alumi-Door, I think you said that you made that, you thought, in 1947 first. Could it possibly have been in 1948 when you first made it?

A. Well, I don't know the exact date of the manufacturing of it.

Q. It could be either 1947 or 1948, as far as you now recall?

A. Well, it could be; yes, sir.

Q. I believe you said in this particular one that this wasn't particularly successful. Can you tell me just very briefly why it wasn't successful?

A. Well, this little piece there was welded. We had to weld that.

Q. That is the 13 double prime?

A. It had to be welded in just the exact position.

Q. Welded to the bar C?

A. Yes.

Q. Which is also called 11?

A. Yes.

Q. So that the only pivot in these arms there between rail 11, arm 13 double prime, and arm 13 single prime, was the single pivot 20? [211]

A. Yes.

Q. What bad effects did you get by reason of having it welded? You say it had to be located very carefully?

A. Yes, it had to be—well, sometimes—

(Testimony of Harry N. Winchel.)

Q. You didn't have any adjustment here, did you?      A. No.

Q. There is no slot in this D, is there, in this form?      A. B?

Q. Yes, B.      A. No.

Q. And no slot at C down near the bottom?

A. No.

Q. Referring to the next one, I, that is, I believe, the ones you made up for Butler Houses?

A. Butler Buildings.

Q. I believe there you said that you thought you made that up in 1947 or 1948. Could that possibly just as well have been 1948 or 1949?

A. No, I think it was before 1949.

Q. You think it was before. This has a horizontal slot, doesn't it?      A. Yes.

Q. A little horizontal slot at G?

A. Yes. [212]

Q. No slot, however, down at the bottom of this L-shaped link arm, is there?

A. That bracket and this bracket is the same one.

Q. On J, the LO 9, that is your today's product sold for low head space requirements, isn't it?

A. That's right.

Q. I think you said that was manufactured first in 1948. Could it have been the early part of 1949 as well as 1948? I mean, are you sure enough to say one way or the other?

A. Well, I am not—I can't specify a certain date.



(Testimony of Harry N. Winchel.)

Q. That is, you are not certain?

A. No. I think it was in 1948. [213]

\* \* \*

Q. Did you find that your customers have any easier [214] job assembling that type where the cantilever arm is fastened to the angle, side plate? I mean, are they any easier to install?

A. No, I don't think so. [215]

\* \* \*

Q. Would you want to give the judge a little idea of the modus operandi, in other words, the system you employ in working out these changes?

A. Well, it is all by the trial and error method. You hold up a set of hardware and change this and change that, and you have to keep working at it until you hit on the right idea. You think it out at night and then come back and work at it the next day. It is all by guess and everything else. [216]

\* \* \*

### JOHN KING McFADDEN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

\* \* \*

#### Direct Examination

By Mr. Beehler:

Q. Mr. McFadden, what is the name of your present business?

(Testimony of John King McFadden.)

A. King Overhead Door Hardware and Tool Company.

Q. You are the sole proprietor of that business, are you?      A. I have a partner.

Q. Your partner's name is what?

A. Pete Novotny.

Q. How long have you been in the business of manufacturing overhead door hardware?

A. Oh, since the last part of 1947.

Q. Were you connected at all with the overhead door hardware business prior to that time other than as a manufacturer? [218]      A. One time.

Q. Your answer is what?      A. One time.

Q. What was that occasion?

A. I worked for Sturdee Steel for about three months, approximately, in 1946.

Q. About what part of 1946 was that, as nearly as you recall?      A. I can't remember.

Q. What did you do at the Sturdee Company in 1946 when you were there?

A. I helped work out some ideas on overhead door hardware.

Q. What kind of hardware was that, specifically?      A. Low clearance, jamb type.

Q. What was it that you did in connection with that hardware? Did you change it or add to it or reconstruct it? Will you please tell us?

A. I used some of my ideas in changing it from the way it had been constructed. The set had already been worked out, but I added some changes to it.

(Testimony of John King McFadden.)

Q. What was it that you added to it?

A. Simplifying it.

Q. At the time, Mr. McFadden, you began the manufacture of jamb type overhead hardware, will you describe the item [219] that you manufactured at that time?

A. Well, it would be hard to describe in just a minute.

Mr. Beehler: May I have this paper marked for identification?

The Court: It may be marked for identification only, Exhibit M.

The Clerk: So marked, Defendants' Exhibit M.

(The document referred to was marked Defendants' Exhibit M for identification.)

Q. (By Mr. Beehler): Mr. McFadden, you recognize this piece of paper as your instruction sheet, I believe?

A. Yes, that's it.

Q. I call this to your attention now solely for the purpose of aiding you in describing the kind of hardware that you were manufacturing in 1947 when you began in business, so will you describe the several parts?

A. This is the type I manufactured in 1947. That is one type of hardware I put out.

Q. When you say this is the type, you refer to the drawing on Exhibit M for identification?

A. Yes, that is one type I put out.

Q. Now let's take it piece by piece. In 1947, the jamb plate, which I will mark 10, how was that constructed?

A. Exactly like that.

(Testimony of John King McFadden.)

Q. In 1947, the power arm, which I number 11, how was [220] that constructed?

A. Exactly the same as that.

Q. The angle iron, which I now number 12, how was that constructed? A. The same as that.

Q. I draw another reference character 13 with a line to another piece of angle. How was that made? A. Exactly like that in 1947.

Q. I now draw an arrow to the spring arrangement, which I will label 14.

A. Just exactly like that.

Q. Was the kicker plate, too, as pictured here? I will identify that with a character 15.

A. The only change in the kicker plate was we added one more hole to this adjustment right here later. This only had four holes right there, but the later ones had five.

Q. This exhibit shows four holes.

A. It has four and one up in the corner, see. The later ones had five right here and one in the corner. That's all the difference. It made a little bit finer adjustment.

Q. After you had manufactured those pieces of jamb hardware of that description, did you or did you not make some changes in it?

A. Yes. I have continued to make changes in it ever since I made it. [221]

Q. What was the first change you made in the hardware of your manufacture?

A. I have changed this arm on some of these sets.

(Testimony of John King McFadden.)

Q. When you say "this arm," you refer to the——

A. Cantilever arm.

Q. The cantilever arm?           A. Yes.

Q. May I mark this, which I failed to do before, with the character 16? How did you change the cantilever arm?

A. I fastened it at the angle right here.

Q. You fastened it to the angle which we have labeled 12?           A. Yes.

Q. Did you have to make an angle any longer in order to fasten it?           A. No.

Q. When you fastened it to the angle, did you then dispense with the little angle 13?

A. I still build this set exactly as it is, only I have made changes in the other sets. I build a number of different kinds of hardware. I have built a hundred different kinds of hardware.

Q. Referring to the other set, Mr. McFadden, I was merely asking you if when you used that single angle iron in that set, you left this little angle iron piece off? [222] I believe you did; is that correct?

A. I still manufacture this set exactly like this. Some of the hardware has this arm fastened to the angle at the present time.

Q. Do you recall when you first manufactured a set where you did fasten the cantilever directly to the angle 12?           A. 1947.

Q. In 1947?

A. Yes. I started them both at the same time.



(Testimony of John King McFadden.)

The low clearance had to have it fastened to the angle iron and standard hardware didn't.

Q. When you manufactured that particular style of hardware wherein the cantilever was attached directly to the angle iron, did you or did you not have any means of adjusting the position of the door when it was fastened on? A. Yes.

Q. How did you do that?

A. You mean when this cantilever arm was fastened to the angle, the adjustment that I used?

Q. Yes.

A. An arm down here and an arm over here in a slot, so that by moving this in the slot, it moved this arm forward and back for making adjustments.

Q. For the sake of the record, may I give you a sheet of paper, Mr. McFadden? [223]

A. It would be very easy to see just exactly what I mean if the hardware set is over there that I seen yesterday. There is one of my sets over there.

Q. We have a piece of your hardware?

A. Yes. Then I could show you exactly what I mean.

Q. I will be glad to produce it.

The Court: We might have that marked for identification. Mark it Exhibit N for identification.

The Clerk: So marked, Exhibit N.

(The article referred to was marked Defendants' Exhibit N for identification.)

Q. (By Mr. Beehler): Mr. McFadden, I show

(Testimony of John King McFadden.)

you Exhibit N for identification, a physical exhibit, and I ask you if this is a piece of hardware which you just asked us to produce?      A. That's it.

Q. This is a piece of hardware of your manufacture?      A. That's it.

Q. Now, Mr. McFadden, will you explain with relation to this piece of hardware——

The Court: Suppose you set it up here where we can see it.

Q. (By Mr. Beehler): ——the adjustment you had reference to?

A. Right here is the adjustment I had reference to.

Mr. Beehler: The witness points to the end of the [224] angle iron to which is attached a short length which is a part of the cantilever arm. Am I correct?      A. That's right.

Q. Will you explain what happens, what is the effect of shifting this bolt and that end of the link in the slot in the angle iron?

A. You set the door in vertical position, if it is in place.

Q. If it is out of position, you can shift it with that adjustment; is that correct?

A. Yes, to a vertical position with that adjustment.

Q. You stated, I believe, the first time you made that kind of an adjustment was in 1947; is that correct?      A. 1947.

Q. Do you have any literature of your own which was printed about that time which you could

(Testimony of John King McFadden.)

produce so that we wouldn't need this physical exhibit in the record?           A. I haven't any with me.

Q. Do you have some?

A. No, I have none of that exact cut. I have none of that. I have never had a picture taken of that hardware. Maybe just a photo of it. I never had any literature made with that drawing.

Q. Do you have any literature that would show this kind [225] of an adjustment in any piece of jamb hardware that might be otherwise a little different from this?           A. No.

Q. Do you still have in your possession any pieces of the actual hardware that you manufactured, that you made in 1947?

A. I am still making it.

Q. But do you still have any piece you made then that you saved, since 1947?

A. No doubt there is some there. I wouldn't say exactly. There might be some of it, but it is exactly the same as I am making now.

Q. Exactly the same with respect to all dimensions, you mean?

A. Yes. This hardware that was made in 1947 is being made at the present time.

Q. You are now referring to Exhibit M for identification?

A. And the same instruction sheet. It has never had to be changed. It was so near that the instruction sheet has never had to be changed.

Q. With respect to the hardware, Exhibit N, does the same statement apply?

(Testimony of John King McFadden.)

A. The same instruction applies to this as to this, the same measurement fits it, so I have never had to make an [226] instruction sheet for that.

Mr. Beehler: I would like to offer in evidence as Exhibit M the instruction sheet previously identified.

The Court: It may be received and marked Exhibit M.

\* \* \*

Mr. Beehler: That is correct. I wish to offer in evidence this physical exhibit, Exhibit N, as exemplifying the hardware of Mr. McFadden as it was produced in 1947.

The Court: It may be received and marked Exhibit N.

The Clerk: So marked.

(The article referred to was received in evidence and marked Defendants' Exhibit N.)

Q. (By Mr. Beehler): Did you know, Mr. McFadden, Mr. Earl Murphy?

A. Yes, sir; I knew him.

Q. Did Mr. Earl Murphy ever work with you?

A. I have worked in the same shop with him.

Q. He was not with you in business, you mean, is that it? A. No. [227]

Q. Did you and Mr. Earl Murphy ever work together on any jamb type hardware?

A. He worked on jamb type hardware in my shop. I might have given him a few suggestions, or something to that effect.



(Testimony of John King McFadden.)

Q. Do you recall when that was?

A. About 1947.

Q. Do you know what Mr. Murphy did when he left your shop?

A. I understood that he started manufacturing hardware.

Q. When did he leave your shop?

A. Well, I would say in 1948, although he wasn't there steady at any time.

Q. Did you ever know that Mr. Earl Murphy worked for Mr. Fowler, the plaintiff here?

A. Yes. I worked for Mr. Fowler at the same time Murphy did.

Q. And that was in 1947, I believe you told us, or 1946?

A. I believe it was 1946.

Q. When Mr. Earl Murphy worked in Mr. Fowler's shop, did he work on jamb type hardware?

A. Some of the time.

Q. Tell us, Mr. McFadden, when you were in the shop with Mr. Fowler in 1946, what kinds of hardware did he have [228] then in his shop?

A. You mean the kind he was manufacturing?

Q. Yes. A. Jamb type.

Q. Did it resemble the jamb type of the circular you showed us here or the jamb type of the exhibit that you have in front of you now, Exhibit N?

A. It was more on the type of things of my instruction sheet, but it was not exact in any way.

Q. Did not Mr. Fowler manufacture what he called a lo-head type of hardware in 1946?

A. Yes, he manufactured the lo-head in 1946.



(Testimony of John King McFadden.)

Mr. Beehler: May I have this Patent No. 2523203 marked for identification, to Fowler, et al.?

The Court: It may be so marked, Exhibit O.

The Clerk: So marked.

(The document referred to was marked Defendants' Exhibit O for identification.)

Q. (By Mr. Beehler): When you were in the shop in 1946, the Fowler shop, did you see any jamb type hardware there which looked like the drawing in this patent, Exhibit O for identification?

A. Yes, sir. This looked very much like that.

Q. You pointed to figure 2. Did that appear to be like the hardware that you were called in to work on? [229]

A. I worked on that hardware while I was there. I made some changes in it.

Q. What changes did you make, Mr. McFadden?

A. This arm.

Q. You are referring to No. 14?

A. As it was then, when the door was up in this position, it had to cross the jamb, part way across the jamb.

Q. And this is the jamb?

A. This is the jamb right here. I put a bend in this arm and brought it back here where it never had to cross the jamb, because sometimes it would make a mark on the jamb where it crossed. I brought this arm back and lengthened this one.

Q. By "this one," you refer to 15?

A. It gave it the same action, but didn't put this arm across the jamb.

(Testimony of John King McFadden.)

Q. And did the piece of hardware that you were experimenting with at that time have an adjustment in the middle of the arm 15 like is shown there?

A. Yes, sir.

Q. What was the purpose of that adjustment, do you know?

A. To set the door in a vertical position when it was closed.

Q. Did you complete a set of that hardware while you were there? [230]

A. It was completed and put on the market while I was there, that is, they had it on the market before, but it was still on the market when I left with the improvements in it.

Q. And you left Fowler about what time?

A. I don't remember the exact dates. I was only there not to exceed three months.

Q. That was within the year 1946 then?

A. Yes, it was.

Q. In any event, it was not later than 1947?

A. No, it couldn't have been.

Mr. Beehler: I wish to offer this Exhibit O in evidence.

\* \* \*

Q. (By Mr. Beehler): Did you, Mr. McFadden, ever sell your jamb type hardware where the hardware was made with a single angle iron to Stevens-Thuet?

A. I have sold Stevens-Thuet a number of sets. I don't recall all the different models.

(Testimony of John King McFadden.)

Q. Did you ever sell your hardware to Coffey Overhead Door Company?

A. Yes, I have sold him some hardware at different times, different styles.

Q. Do you recall when you first sold to [231] Stevens-Thuet?

A. No, I cannot give you the date.

Q. Could you give us an approximate date?

A. 1948 or 1949.

Q. How about with respect to Coffey, can you give us the date when you first sold to him?

A. Not closer than to say 1948 or 1949.

Q. To whom did you sell your jamb type hardware of the kind of Exhibit N in 1947?

Mr. Fulwider: May I have the question, please?

The Court: Will you read the question, please?

(Question read.)

The Witness: To Door Hangers.

Q. (By Mr. Beehler): Do your records show how many of those items you sold during the year 1947? A. I am not positive that they do.

Q. Can you give us an approximate idea here without referring to your records?

A. This type of hardware right here?

Q. Yes.

A. There were very few of that type sold.

Q. In 1947? A. In 1947.

Q. The other type hardware, about how much?

A. I can't even guess at it without looking [232] it up.

(Testimony of John King McFadden.)

The Court: Before we proceed with the testimony, I wonder if I could ask a question? I understand from this witness that the structure as depicted in Exhibit O was made somewhere back in 1947. Is that correct?

Mr. Fulwider: I think there is some confusion in his testimony as to what was made and what was not.

The Court: I am asking, isn't that what this witness testified?

Mr. Fulwider: As I understood it, he said there was such a structure in existence in the shop.

The Court: Let's assume just for a moment that there was such a structure and he worked upon it and it was sold. I notice now the patent wasn't granted until 1950. It was filed in 1946.

Mr. Fulwider: That's right, your Honor.

The Court: Is there any question here about this being prior art?

Mr. Fulwider: Yes. It is not prior art.

The Court: What's that?

Mr. Fulwider: It is not prior art. [233]

The Court: What do you say?

Mr. Beehler: Yes, there is a question of it being prior art.

The Court: Do you say it is?

Mr. Beehler: I say technically it is not prior art. It can, however, be used to show a state of art to determine whether or not there is invention present in the device in suit. It was also used for



(Testimony of John King McFadden.)

illustrative purposes to assist this witness in pointing out what he did in 1946.

The Court: I notice in Exhibit O that the various bars were made in two pieces, that is, they were bolted in the middle.

Mr. Fulwider: That's right, your Honor, in this experiment. You see, this patent didn't issue until after the other one, I think.

The Court: Then the truth of the matter is back in 1947 there was some work being done upon these bars that had been made in two pieces instead of one.

Mr. Fulwider: Mr. Fowler was working on this all the way along the line, and he filed these two separate kinds. He had experimental models and then he changed. As I understand it, there were actually bars he was playing around with.

The Court: May I ask this witness a question?

Mr. Fulwider: Yes. I wish you would, to clear it up.

The Court: I want to refer you to Exhibit O and call [234] your attention to the fact that the bars No. 15 and No. 12 seem to be in two pieces, bolted in the middle.

The Witness: This is bolted in the middle.

The Court: That is, 15 was bolted in the middle?

The Witness: Yes, and there was two sets of holes there, one adjustment for a 7-foot door and one for an 8-foot door, but that was all.

The Court: How about 12?



(Testimony of John King McFadden.)

The Witness: This one had two holes in it, one for the 7 and one for the 8.

The Court: When you went to work for Mr. Fowler, was the structure in that kind of condition, that is, two bars here and two pieces, or is that something that developed while you worked there?

The Witness: That is something that was there.

The Court: Already there?

The Witness: To make the adjustment for the 7 and 8-foot doors.

The Court: Do you know whether or not that structure was ever made and sold?

The Witness: Yes, it was made and sold.

The Court: You are sure of that, are you?

The Witness: Yes, sir.

The Court: On the market?

The Witness: Yes, sir. [235]

The Court: It was not for experimental purposes only?

The Witness: This set was made and sold.

The Court: In 1947?

The Witness: Yes, sir.

The Court: All right.

Mr. Fulwider: I am thoroughly crossed up, your Honor. That is contrary to all my information.

The Court: Then what am I supposed to be if you are crossed up?

Mr. Fulwider: I would like to go through it with this witness element by element, maybe, because it is contrary to my understanding.

(Testimony of John King McFadden.)

The Court: All right.

Mr. Fulwider: As I understand it, Fowler and his associates, his employees, had always been experimenting since he started, and this structure, of course, was filed on in 1946. I think it was in existence at the time he filed the application. The question is the sale. I would like to ask him about that, because I don't think that is correct.

The Court: The thing that is important here, as I understand it, from what has gone on, is whether or not there is invention in that bar 15 or arm 15, where you make it in two pieces rather than one. Here is a witness who testifies back in 1947 here was a structure that was made and sold, and it shows that the bars were made in two pieces instead of one. [236] It seems to me there is your lawsuit.

Mr. Fulwider: I think you are right. If an arm as shown in the other case that functions was sold, it would certainly be a public sale. Mr. Smythe calls my attention to the function of that thing, and that this arm was of the old style type, positioned out at the end, so that adjustment was not had in this manner.

The Court: It is true in Exhibit O, in the structure in Exhibit O, you use three bars, and in your patent, Exhibit 1, you only use two bars, but the thing I am interested in, you take bar 15 in Exhibit O, and there is a division in the center of the bar in order to make the adjustment. He says to make an adjustment for 7 and 8-foot doors. What

(Testimony of John King McFadden.)

difference does it make whether it makes an adjustment in feet or in inches?

Mr. Fulwider: I think it makes this difference. As to the theory, the operation is different. If this bar link 15 is or operates in the old style apart from this plate, then the function played by any adjustability here is entirely different. It is not for that purpose. It doesn't function that way. As I understand it, it was never sold. If any were sold, and I am not persuaded there were, but assuming there were, they would be of this kind where this link 15 is a part of this, and this particular invention we have got here is limited to that feature. In other words, adjustability here [237] is purely academic unless you tie this to this.

The Court: You are giving me an argument as to what the result will be. All I have is the picture, and I think I can see. Some people doubt sometimes whether I can see, but I think I can see. This witness says he can explain it.

The Witness: I believe you have a misunderstanding, your Honor.

The Court: Fine. Then you can straighten me out.

The Witness: This arm has to be approximately three inches longer than on the 7 feet. This adjustment—

The Court: You are referring to 15?

The Witness: Yes. That was put in there for that purpose, but not to make a vertical adjustment on the door. This has nothing to do with making vertical adjustment on the door.

(Testimony of John King McFadden.)

The Court: Where did you make your vertical adjustment on the door?

The Witness: Where you put this on the door right here makes your vertical adjustment. It has nothing to do with this part at all. This is where you make your vertical adjustment right here, because where you put that on——

The Court: Although the purpose was to make that applicable to either a 7 or 8-foot door, nevertheless, the fact is that that bar was separated at the middle and bolted together with bolts so that the adjustment could be made? [238]

The Witness: There was no adjustment there, your Honor. It was only round holes. There was no adjustments. The adjustment had to be made here.

The Court: Isn't it true you have got two bars here and one goes in the other and they are bolted together? Isn't that what the picture shows?

The Witness: They are bolted together, but not in a slot. They had to be put in a set position each time they were put together. There was no adjustment in this arm.

The Court: But the fact of the matter is there were two pieces here instead of one.

The Witness: They were bolted together, but no adjustment in the center. [239]



(Testimony of John King McFadden.)

Cross-Examination

By Mr. Fulwider:

Q. As I understand it, Mr. McFadden, what you are explaining to us a moment ago was that this arm 15b and this arm 15a each had a series of holes in them and the holes overlapped so that you could vary the length of it by overlapping and sticking the bolts through different holes. Was that what you said? That is the way I understood it. That you didn't have slots here like these dotted lines.

A. There was no slots.

Q. So that the ones you were talking about didn't have slots? [243]

A. That's right.

Q. Here is one has a series of holes and here is the other one with a series of holes, and you take your pick, and you use any two holes; is that correct?

A. That's right. The arm was the same as a solid arm. The only difference was to get the difference in length for 7 and 8-foot hardware.

Q. Am I also correct in this understanding of what you said, that the choice of any pair of holes here didn't affect the adjustment of the door?

A. Not in any way.

Q. The door was adjusted by moving this thing back and forth?

A. That is the only adjustment.

Q. And once you got that anchored, that would do it?

A. That is correct.

The Court: May I break in again?

Mr. Fulwider: Yes.



(Testimony of John King McFadden.)

The Court: You have had the witness to say that was not slotted.

Mr. Fulwider: Yes.

The Court: What are you going to do about your patent which says it is slotted?

Mr. Fulwider: It is slotted in there. That is why I brought that out. You see, without examining it, he said [244] what was sold was covered by the patent, and I was quite sure what was sold was not the same. The patent shows some slots for general easier adjustment, and I think what was actually sold was a series of holes. The effect is the same. It is a question of how much or how little. But that isn't the important point. The important point is what we were discussing a minute ago.

I would like to have marked for identification a photo which I think will tend to clear this up that was made of some hardware that was made about the same time.

\* \* \*

Q. (By Mr. Fulwider): I show you, Mr. McFadden, a photograph, Exhibit 23 for identification. Can you tell me whether or not you ever saw any hardware like that in Mr. Fowler's establishment while you were there? A. Yes, sir.

Q. Did you have anything to do with the development of that? A. Yes, sir.

Q. Would you explain to the court what you did and how this grew out of what? I think that is the best way. [245]

A. They had this hardware in this form——

(Testimony of John King McFadden.)

The Court: Speak up so we can all hear you.

The Witness: They had this hardware in this form, except this arm was straight and it had to cross the jamb when the door was open, and it would sometimes mark the jamb. So I bent this arm like this so that it never went forward far enough to cross the jamb. By linking this other arm, it made up for it. That was one of the changes that I made in the hardware.

Q. (By Mr. Fulwider): That is called, I believe, the boomerang type.

A. I believe that is what they named the boomerang.

Q. Can you compare, if it means anything, and I think it does, compare this boomerang, Exhibit 23, with the hardware shown here? Did one grow out of the other or are they connected?

A. This one grew out of that.

Q. That is, the boomerang 23 grew out of this?

A. That is correct.

Q. This boomerang—well, that doesn't show the other end. Do you remember whether the end of the link—let's see if I can see it. Do you remember what the end of this link adjustment hooked onto? Was it on this side rail or was it down below, as shown in the patent?

A. It was down below like this. [246]

Q. As shown in the patent? A. Yes.

Q. Were any of these sold, Exhibit 23?

A. Yes, sir, they were sold.

Mr. Fulwider: I think that tends to clarify it a

(Testimony of John King McFadden.)

little bit, your Honor. We probably won't get it completely verified until Mr. Fowler explains all the odds and ends.

Q. Do you think of anything else, Mr. McFadden, that would tend to shed light on this situation?

A. Well, getting back to the adjustable arm, I can show you the advantages the adjustable arm has over this type, if that is necessary.

Q. What was that? I didn't catch it.

A. I can show the advantages of the adjustable arm over this type.

Q. All right. Would you do that, please? Maybe that would help us.

A. When the hardware is in the up position, when we have to change this adjustment here to make the door fit properly when it is closed, then in the up position, it will either—it tends to tip the door out too far, or in the other way, maybe it will tip it in like this, because we are moving this arm forward and back. In the adjustment here, in the arm itself, it don't have that effect. I have tried it both ways. [247]

Q. If I understand you correctly, when you say the adjustment here in the arm, you mean a slotted arm like is being used in the Sturdee structure?

A. The slotted arm will not have the effect of tipping the door out too far or in too far when it is in the open position, which this does have that effect.

Q. Let me see. How much can you get of this bolt loose? Well, I will ask you the question. In

(Testimony of John King McFadden.)

moving the bolt in the slot in the lower end of the side rail from one extreme position to the other, thereby rocking about this center arm as a pivot, do you get a large or a small motion?

A. Set the door by moving that adjustment and the door is in the closed position like——

Q. Can I help you?

A. This is the way it is in the closed position. By moving this arm, I can set that in an inch or I can set it back an inch, which gives you all the adjustment that is necessary, vertical adjustment in the door.

Q. Have we got a wrench? I wonder if we can put this down on its side and demonstrate it.

A. I have one.

Q. Good. You come completely equipped?

A. I always have them in my pocket.

Q. Do you think if you laid it down like it was and then shoved it back and forth, we might take a look and see [248] how much movement there is.

A. (Witness demonstrating.)

That adjustment is now at the end.

Q. It is clear at the lower end?

A. Now, with the door closed, you see that sets in here approximately one inch because this is the jamb. That adjustment sets it in an inch, and when we set it in the other end of the slot, it is like this (indicating). It fits in back. That isn't quite the end of the slot there.

The Court: Well, that's all right. I can see what you are getting at.



(Testimony of John King McFadden.)

Q. (By Mr. Fulwider): As you move this arm——

A. It changes to vertical position, the door, you see.

The Court: Is that your structure?

The Witness: Yes, sir.

The Court: Why didn't you ever use the slotted arm? You knew of the slotted arm door.

The Witness: Not at the time I made this, I did not know of the slotted arm.

The Court: After you made it, you knew of the slotted arm?

The Witness: Well, by the time I looked into it and decided to use it, I inquired and they told me Roscoe had a patent applied for on it and I didn't go into it. [249]

The Court: But in your opinion the slotted arm is the best?

The Witness: It is the best there is, no doubt in my mind about it. If I could use it, I would.

Mr. Fulwider: I think we have about covered it, haven't we, your Honor? Perhaps we will have to digest all the testimony a little bit, but I think we have covered it.

The Witness: You see, the adjustment is here.

The Court: Yes, I know what it is. All right.

Q. (By Mr. Fulwider): I might ask you one question. I think you said this. I am not sure. In your opinion, is this type of hardware where you tie the link in the side rail, does it have any advantages over that type shown in the patent we were



(Testimony of John King McFadden.)

talking about a minute ago, where you tie it down here? In other words, tying the link to the one side rail instead of having to have it on a separate side rail?       A. You mean tie this link to the angle?

Q. Yes.

A. It simplifies the installation of the door. [250]

\* \* \*

ROSCOE FOWLER

called as a witness by the defendants under Rule 49b, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Beehler: [252]

\* \* \*

Q. Maybe if we start with the time when you made it commercially, we can work back from there. Mr. Fowler, when was it that you made the first commercial sale, the first public sale, of the structure like the patent in suit?

A. February, March, I believe, of 1949.

Q. To whom did you make the first sale?

A. I don't know.

Q. Did you make it to Vimcar?       A. No.

Q. How long before you made the first sale did you [253] have your tooling and your dies complete to make it?       A. Before I made the first sale?

Q. Yes.

A. I wouldn't know that.

(Testimony of Roscoe Fowler.)

Q. You would have drawings prepared, would you not, for the fabrication of that?

A. I did not have.

Q. How did your workmen know how to make it?

A. They worked from parts, the developed parts.

Q. Did you have drawings for the parts?

A. No.

Q. How did your workmen know how to make the parts?      A. I made the parts.

Q. How did you know how to make the parts without drawings?

A. Trial and error method.

Q. All the production of this device——

A. I did not hear you.

Q. Is all the commercial production of this device, the patent in suit, made without any drawings?

A. There is a drawing, but where it came from, I don't know.

Q. Where is the drawing?

A. I don't know that, either. [254]

Q. How do you know there is a drawing, if you don't know where it is?

A. I seen the drawing. We found the drawing.

Q. Where was it when you saw it last?

A. In my office.

Q. When was that?

A. I don't know. A month ago.

Q. Where is it now?      A. I don't know.

Q. How long did you say it took to tool up and make this device commercially?

A. How long it took to tool up for it?

(Testimony of Roscoe Fowler.)

Q. Yes.

A. Well, we made temporary tooling to start with. I would say it took approximately a year to complete the tooling in our plant.

Q. Are you saying, then, that you made the first one of these devices experimentally a year before the first commercial sale?

A. No, I didn't say that. I said we used temporary tooling to start with.

Q. How long did it take to get that together?

A. The temporary tooling?

Q. Yes.

A. Oh, a month, two months, maybe a [255] month.

Q. That would be a month before your first sale that you made the temporary tooling then, if I follow you?      A. About that.

Q. What was the temporary tooling made from? Your first model, your first experimental model?

A. That's right.

Q. Then I take it your first experimental model was completed about a month before your first commercial sale? Do you follow me there?

A. By first tooling—tell me that again, will you?

Mr. Beehler: Will you read the question, please?

(Question read.)

The Witness: Well, that isn't exactly right, because there were several experimental models before we arrived at what we wanted.

Q. (By Mr. Beehler): Do you still have them?

(Testimony of Roscoe Fowler.)

A. No.

Q. When was the first experimental model completed?

A. For this particular set of hardware?

Q. Yes. A. I wouldn't know—this——

Q. How many—excuse me?

A. It develops from time to time. I couldn't tell when we started or exactly when we finished it. The chances [256] are before we got the tooling finished, we made some changes in the set.

Q. There was some date, though, was there not, when the device was all put together and hung on a wall and it worked?

A. I wouldn't attempt to state a date. There are many, many ways that a set of hardware will work, but the final set, the way we manufacture it now, I couldn't say when we finished it.

Q. Mr. Fowler, is it your contention that the gusset plate, which is identified by the reference character 16, the use of the gusset plate on jamb type hardware, is a part of your invention?

A. You are familiar, are you not, Mr. Fowler, with Tavart hardware? A. Yes, sir.

Q. You knew about the Tavart hardware before you produced your own hardware commercially?

A. I did.

Q. How long before?

A. I knew about Tavart hardware, I believe, in 1946 or 1945.

Q. How was the Tavart hardware that you saw in 1946 or 1945 constructed?



(Testimony of Roscoe Fowler.)

A. Well, you mean what means for the particular adjustment [257] in question?

Q. Yes. A. It had a slot in the bracket.

Q. Were there any other differences in that Tavart hardware?

A. Adjustments, you mean?

Q. Any other differences at all?

A. None that I know of. Different from what?

Q. Different from yours.

A. In 1946 or 1945?

Q. Yes, when you first saw it.

A. Yes, there was a difference. I believe they had a solid door support and a cantilever arm connecting to the door support.

Q. Reading from the file history of your patent, it says:

“The present invention greatly simplifies the hanging of overhead doors utilizing jamb hardware.”

Is it your contention that your patent simplifies the hanging to a greater degree than the Tavart hardware that you knew about?

A. I would say it is much more practical.

Q. Will you tell us how it is more practical than that Tavart hardware? [258]

A. There is no problem with the adjustment. Once the adjustment is made, why, it will stay.

Q. Will you repeat that, please?

A. I say there is no problem with the adjustment with the vertical position of the door. Once the



(Testimony of Roscoe Fowler.)

adjustment is made with the hardware, why, it stays.

Q. You say that is not true of Tavart?

A. Well, it is somewhat of a problem with Tavart.

Q. When the Tavart hardware is used to hang a door, how do you plumb the door?

A. You plumb the door with the hardware, all hardware.

Q. The door that the hardware is fastened to?

A. That depends on the man that is installing it. I think it is usually lined up with the jamb, the opening.

Q. After you fasten the hardware on it, can you plumb it?           A. Plumb the door?

Q. Can you straighten it out and make it vertical if it isn't vertical to start with?

A. I think the door is the place to start with. The adjustment is made before the door is used.

Q. That is the same way yours is put up, isn't it?

A. That's right.

Q. It was brought out in testimony earlier that you [259] had charged the Winchel Company with infringement of your patent. I will lay before you Exhibit L. I also want to lay before you another Winchel circular, Exhibit J. I want to ask you, is it your position that hardware of this structure infringes the patent in suit?

Mr. Fulwider: I object to that, your Honor. What does any layman, owner of the patent, know about whether hardware infringes other than what his attorney tells him?

(Testimony of Roscoe Fowler.)

The Court: He is the plaintiff here. If he doesn't make a claim of infringement, even though an attorney may make a claim of infringement, he is the real party in interest.

Mr. Fulwider: As long as we clearly understand he is not attempting to say or give reasons as to why it is or is not infringement, he can say what he wants to about it.

The Court: Objection overruled. He can testify whether or not he claims this is an infringement.

The Witness: It isn't fair, because I know it isn't now.

The Court: You know it isn't?

The Witness: That's right. I was under the impression it infringed at the beginning, I mean when we served notice on Mr. Winchell, I was under the impression it infringed on our hardware.

The Court: But you are willing now to say it doesn't [260] infringe?

The Witness: I know there is prior art on it.

Q. (By Mr. Beehler): Was there not some development along about the time you came out commercially with the device of the hardware in suit to show that there were advantages in a short cantilever arm over a long cantilever arm?

A. You mean for installation reasons?

Q. For any reason.

A. Well, that is the advantage. It is less bulky and easier to package, and so forth. That is one advantage.

(Testimony of Roscoe Fowler.)

Q. A short cantilever arm is better?

A. Yes. It goes in a shorter box.

Q. Are there any advantages for installation reasons?

A. Installation reasons? With a shorter cantilever arm?

Q. With a shorter cantilever arm.

A. I don't know really what that would have to do with it. I can't think of any reason for it at this time, any reason for it being an advantage.

Q. Is it not true, Mr. Fowler, that in the latter part of 1948 or the first part of 1949, you inspected a trial installation of a piece of Tavart hardware, saw it for the first time, and then measured it prior to your coming out with this device of the patent in suit? [261]

A. Every piece of hardware I have ever heard of, I inspected and measured. I think everybody does the same thing in the hardware business.

Q. Then it is true? A. Yes, it is true.

Q. That you measured up a piece of Tavart hardware? A. That's right.

Q. A month or so before you came out with the structure of the patent in suit?

A. I wouldn't say how much before.

Q. How long before?

A. I wouldn't attempt to say that.

The Court: Maybe this is a pretty good place to break for the day. It's nearly 4:00 o'clock.

How many more witnesses do you have?

(Testimony of Roscoe Fowler.)

Mr. Beehler: I have Mr. Matlin, who will be here to identify a date. It will take him five minutes. I have an expert, a practical expert, primarily for the purpose of summing up some of what we have talked about here and correlating it with the prior art, which I have not yet introduced, but which is pertinent to consider—prior patents, I should say, which are important to consider with the prior public use of the device.

The Court: Can we finish this case in another half day? [262]

\* \* \*

Q. (By Mr. Beehler): Mr. Fowler, did you bring with you today the drawing which you were requested to bring by subpoena duces tecum this morning?

A. I didn't know I was supposed to bring a drawing.

Mr. Fulwider: Did you serve the subpoena?

The Court: Will you speak up, please?

The Witness: I didn't know I was supposed to bring a drawing.

Q. (By Mr. Beehler): I take it then that the Marshal didn't reach you with the subpoena. I request you then, Mr. Fowler, to bring in to court tomorrow morning the drawing which you referred to last in your testimony on Friday, which you stated was in your office a month ago and which you haven't been able to find since.

Mr. Fulwider: We have a copy here you are



(Testimony of Roscoe Fowler.)

very welcome to have, if you had just asked for it. There are two there.

Mr. Beehler: May this be marked for identification as defendants' exhibit next in order?

The Court: Exhibit P.

Mr. Beehler: I would like to reserve the examination of this.

The Clerk: Defendants' Exhibit P for identification. [267]

\* \* \*

Q. (By Mr. Beehler): Now, Mr. Fowler, at the taking of your deposition you stated, in answer to this question I read, "After the improvement which you just now mentioned, what, then, would you say was the next major improvement?"

"A. As I remember, after that came the later type hardware, with the two-piece cantilever arm and the decreased head room.

"Q. When did that take place?"

"A. I believe about 1949, February—January, February, maybe March."

Is that still your contention, that that is the date when the two-piece cantilever originated with you?

A. That is right.

Mr. Beehler: That was at pages 13 and 14.

Q. (By Mr. Beehler): Now, also in your deposition, on page 30, in connection with questions regarding the Lo-Head jamb type hardware, I read as follows:

"And in the construction in the Lo-Head jamb type hardware, did you make some that had the



(Testimony of Roscoe Fowler.)

cantilever arm extended?           A. No.

“Q. Did you ever make any that had a cantilever arm extended in that way?           A. No.

“Q. Did you ever make any that had the main arm [268] extendible, the way it is shown in the patent?           A. No.”

I ask you now, is it still your statement, or, do you still make the statement that the Lo-Head jamb type hardware, which you initially manufactured, was not sold with an extendible cantilever arm?

A. That is right.

Mr. Fulwider: May I ask a question? In the deposition the question was, “Did you ever make.” Now Mr. Beehler says “Did you ever manufacture.”

I think he ought to clarify what he means by “manufacture.” Does he mean “manufacture” for sale or “manufacture” experimentally, or what?

Mr. Beehler: That is reasonable.

Q. (By Mr. Beehler): Is it still your contention that you did not manufacture for sale the Lo-Head jamb type hardware with the extendible cantilever arm?

A. I am not sure I understand the question right. If you mean——

Mr. Beehler: Will you read the question?

(The question was read.)

The Witness: I never manufactured it for sale.

Q. (By Mr. Beehler): You have not manufactured that type of jamb hardware for sale, is that your answer?           A. That is right. [269]

(Testimony of Roscoe Fowler.)

Q. Did you sell any jamb type hardware, Lo-Head jamb type hardware that did have a cantilever arm, which was extendible?

A. Did I sell any?

Q. Yes. A. That is extendible? No.

Q. Were you aware, Mr. Fowler, in early 1948 or during 1948, of a distinction which the trade drew between a long cantilever arm and a so-called short cantilever arm? A. Yes.

Q. Do you recall when it was that you saw the first example of the Tavart hardware that had a short cantilever arm? A. No, I don't.

Q. Do you have a salesman working for you by the name of Johnnie Owen?

A. No, I haven't.

Q. You did have a salesman by the name of Johnnie Owen working for you in 1948?

A. Yes.

Q. Did you not, in company with Johnnie Owen, inspect a service trial installation of the Sturdee jamb type hardware, with a short cantilever arm, sometime in 1948? A. A Sturdee——

Q. Excuse me. May I be corrected? Tavart type, a piece of Tavart hardware with a short cantilever arm. [270] A. I don't recall.

Q. Mr. Fowler, you produced some literature here showing your Econo-Jamb. I ask you to re-examine Exhibit 14, which is a piece of Sturdee Econo-Jamb literature, and open it at the inside, where there are pictures of cartoon characters of

(Testimony of Roscoe Fowler.)

a little man. Are those the cartoon characters you complain of, as being copied by the defendant?

A. Maybe he is not in the same position, but it is the same character.

Q. What is the date of that piece of literature which you hold in your hand? When was that published?

A. I wouldn't have any way of knowing.

Q. What was the earliest date you did publish for distribution any literature with that little cartoon man on it?

A. I really don't know.

The Court: May I ask this witness a question?

Mr. Beehler: Yes.

The Court: Did you get that picture from some other publication?

The Witness: Our advertising agent originated this.

The Court: Do you know whether he originated it or whether he copied it from some other—

The Witness: He originated it.

The Court: You think he originated it?

The Witness: Yes. [271]

The Court: Was he working for you?

The Witness: Yes.

Q. (By Mr. Beehler): You stated, I believe, Mr. Fowler, that Mr. Moore, who testified here, acting under your instructions, did the art work and photography for certain instruction sheets. When was the first instruction sheet printed and distributed, which Mr. Moore was responsible for the art work on?

(Testimony of Roscoe Fowler.)

A. I have no way of telling.

Q. Do your records tell that?

A. The records would probably tell it.

Q. After the recess will you produce, will you provide us with that information, please?

Now, Mr. Fowler, you are familiar, of course, with your own jamb type hardware of the sort which is in issue here and you are familiar with the defendants' alleged copying of that hardware.

Would you point out, Mr. Fowler, if you can, what ornamental or non-functional features of your hardware which were copied by the defendants?

The Court: May I interrupt? You contend there is any ornamental question here?

Mr. Fulwider: I was going to say we stipulated the other day, I think, there was nothing ornamental about this.

The Court: Let us eliminate the ornamental part. [272]

Mr. Beehler: That stipulation is accepted.

I introduce in evidence now a certified copy of the file history of the patent in suit, No. 2,516,196.

The Court: It may be introduced and marked Exhibit Q.

The Clerk: Exhibit Q in evidence.

(The document referred to was marked Defendants' Exhibit Q and received in evidence.)

Mr. Beehler: I wish to refer to page 40 of the file history, to a brief sentence which has reference to the drawing of the patent in suit. May I read it?



(Testimony of Roscoe Fowler.)

Mr. Fulwider: You are referring to what page?

Mr. Beehler: Page 40 of the file history. Reading from page 40, the last sentence of the first paragraph, at the top of the page:

“For example, the length of the member 16 might be made adjustable, in which case the advantages of the invention could be obtained without adjustment of the length of the link 14.”

Q. (By Mr. Beehler): Calling your attention to the drawing of the patent in suit, and particularly the member 16 just referred to in that quotation, and the link 14, also just referred to in that quotation, is it your contention that the advantages of the invention could be obtained without adjustment of the link 14, if the member 16 were made adjustable? [273]

Mr. Fulwider: Would you read that again? I haven't been able to find it in our file. It doesn't seem to be complete.

Mr. Beehler: Here it is.

The Court: Will you read that last question?

(The question was read.)

The Witness: The answer to that would be yes.

Q. (By Mr. Beehler): You knew, I assume, Mr. Fowler, Mr. Earl Murphy? A. Yes.

Q. He was an employee of yours in 1947, am I correct? A. Yes.

Q. Is it not true in 1947, Mr. Murphy demonstrated to you an item of jamb type hardware with a single angle iron for attachment to the door, in



(Testimony of Roscoe Fowler.)

which the cantilever was attached to the angle iron by means of a pin or rivet or comparable fastening means to or through a slot in the angle iron?

A. It is not.

Q. You knew, however, of that sort of an adjustment, did you not, in 1946?      A. I did not.

Q. What kind of a piece of jamb hardware did Mr. Murphy show you in 1947?      A. 1947?

Q. Yes. [274]

A. I didn't know he showed me any.

Q. Did he show you any in 1946?

A. Not that I know of. I understood you to say '44.

Q. Well, I say, did Mr. Murphy show you any type of jamb type hardware in any of the years 1944, 1945, 1946 or 1947?

A. Earl Murphy worked on the Lo-Head set, the original Lo-Head set. That was the only jamb hardware he ever had anything to do with around my place.

Q. Was there a slot in the angle iron in that hardware just mentioned?      A. No.

Q. There was never?      A. Never was.

Q. Who did the art work, Mr. Fowler, for you, before February of 1949?      A. The art work?

Q. Yes.      A. On what?

Q. On jamb type hardware.

A. Carvel Moore, I believe.

Q. Mr. Moore did it before February?

A. I believe so.

Q. Who did the photography for you on jamb

(Testimony of Roscoe Fowler.)

type hardware before February of 1949? [275]

A. Carvel Moore.

Q. How early did Mr. Moore start to do that art type work on the jamb type hardware for you?

A. I don't know.

Q. Did you employ anyone else, prior to your employment of Mr. Moore, for the work that I just mentioned?

A. Prior to Mr. Moore?

Q. Yes. A. Not that I remember of.

Q. Is that the same H. C. Moore who made the original of the drawing No. 491, which you exhibited and presented here today in court?

A. Yes.

Q. Tell us, Mr. Fowler, to what class of trade you presently sell the jamb type hardware of the type here in issue. What I mean is, do you sell to wholesalers or jobbers or retailers, or to whom?

A. We sell wholesalers and dealers, door companies.

Q. You do not sell retailers, that is correct, is it not?

A. We have.

Q. Do you, as a business practice, sell retailers?

A. We do not encourage it.

Q. You have handled your business in that way, have you not, ever since you began the production and sale of the jamb [276] type hardware here in issue?

A. That is right.

Q. This drawing here, No. 491, which you exhibited here, Mr. Fowler, I call your attention to the fact that in the title block it reads as follows:

(Testimony of Roscoe Fowler.)

“Details of Olympic Jamb Type Hardware,” and bearing a date of September 1, 1948.

It was a fact, was it not, Mr. Fowler, this particular hardware was designed for the company handling Olympic hardware?

A. No, it is not a fact.

Q. Can you explain why that particular designation appears in the title block?

A. I believe the drawing is one year older than '48. In other words, it is September, '49, instead of '48. That is a typographical error.

Q. It is your contention this date that appears here, namely, 9-1-48, is in error, by year?

A. That is right.

Q. May I ask, did anybody ever call your attention to that here before?      A. Not here.

The Court: At any time?

The Witness: Yes.

Q. (By Mr. Beehler): When was it first called to your attention? [277]

A. When we found the print.

The Court: Just the other day?

The Witness: I would say we found the print about a month ago, or so.

The Court: About a month ago?

The Witness: Yes.

The Court: That is the first time anyone called your attention to it?

The Witness: That is the first time I ever saw the print.

(Testimony of Roscoe Fowler.)

The Court: That is the first time you ever saw the print?

The Witness: That is right.

The Court: Do you know how it came in your possession?

The Witness: It wasn't in my possession.

The Court: Where did you find it?

The Witness: At the patent attorney's office.

Mr. Beehler: I offer this in evidence.

Mr. Fulwider: May I expand on that a little bit? That was the office of Mr. Stephenson, who was the successor of Mr. Hall, who died, and having handled this matter we found it just about a month or six weeks ago.

Q. (By Mr. Beehler): Mr. Fowler, where is the original of that drawing?

The Court: He says he never saw it until a month ago.

The Witness: Your Honor, I think we found the original.

The Court: You found the original? [278]

The Witness: Yes. Mr. Moore had the original.

Mr. Fulwider: I believe Mr. Moore has a tracing. That is my recollection of the way he talked. When we found it we discussed the matter with him and asked him how come this 1948 date.

The Court: Cannot we stipulate? I do not know whether it can be stipulated. Perhaps it is not a stipulation. But draftsmen do not usually make mistakes.

Mr. Beehler: I will stipulate to that.



(Testimony of Roscoe Fowler.)

Mr. Fulwider: Usually they don't.

The Court: Draftsmen are very particular, very careful. It seems to be very peculiar for a draftsman to make a mistake of a year, in a date.

Mr. Fulwider: Even more peculiarly is the number 491. Mr. Ward tells us it is his code number he uses for drawings and he uses the same system for invoices. 49 means the year and No. 1 means the first drawing he made for Mr. Fowler in the year 1949. We taxed him with that and he swears up and down the 491 is controlling. We have an invoice that support that, which we can bring in.

We know this: That we didn't even think of Olympic until the year 1949, so it couldn't have been 1948. We didn't start selling Olympic until the spring of 1949.

I would like to put Mr. Moore on the stand, if I may, tomorrow—he is not available today—to explain this whole [279] matter. It looks screwy on the face of it, I grant you. It did to me, but I am firmly convinced that he did, for some strange reason, make a mistake in the year. He got his code system right. Those are the facts as I know them.

Mr. Beehler: I am afraid I can't stipulate to counsel's statement.

Mr. Fulwider: No, I don't expect you to.

Q. (By Mr. Beehler): I ask you, Mr. Fowler, who gave you the name Olympic, or, to Mr. Moore, when he put it on this drawing?



(Testimony of Roscoe Fowler.)

A. I don't know; probably me.

Q. This is the same hardware, is it not, that Vimcar, the defendant here, did distribute, which was supplied to them by you?

A. That is right.

The Clerk: Does your Honor want to mark that in evidence?

The Court: I thought this was in evidence.

Mr. Beehler: I did offer it.

The Court: No. It is only marked for identification.

Mr. Beehler: I offer it now in evidence.

The Court: It may be received and marked in evidence.

The Clerk: So marked, Exhibit P.

(The document referred to, previously marked for identification as Defendants' Exhibit P, was received in evidence.) [280]

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### Cross-Examination

By Mr. Fulwider: [281]

\* \* \*

Q. Will you explain to the Court the hardware that was sold by you which involved this two-piece—I call it jackknife—jackknife type cantilever arm and whether or not it had any extension, and if you will go on, please, and discuss the matter of the boomerang we put a photograph in to show—

First, let's get at it this way: You did sell hardware that you call Lo-Head, as I remember?

(Testimony of Roscoe Fowler.)

A. That is right.

Q. That Lo-Head hardware was similar to what?

A. That is the first hardware sold under that trade-mark. It was similar to what is shown in this patent, with the exception of the extendible cantilever arm.

Q. It was the same as this hardware shown in Exhibit O? It had a one-piece cantilever arm, is that it? A. That is right.

Q. When you say "cantilever arm," you mean this arm marked 15, do you not?

A. That is right.

Q. There were no extensions there?

A. No.

Q. No slots? A. No.

Q. No holes? [282] A. No.

Q. Now then, were very many of those sold?

A. I would say approximately 400 sets.

Q. What was the next change in that type of hardware you sold under the name of Lo-Head?

A. The boomerang arm was curved.

Q. Now, the boomerang arm, is that this one, No. 17? A. That is right.

Q. The one marked red, that goes at the upper angle?

A. That is right. That was changed.

Q. I call your attention to this photograph, Exhibit 23, which I believe is only marked for identification so far. Can you identify that photograph? And, if so, will you point out therein the boomerang arm you just mentioned?

(Testimony of Roscoe Fowler.)

A. There is a boomerang arm, the curved arm (indicating). See this arm here stops right in the middle of the jamb, and it made a bad mark on the door opening, so we curved this arm so that would extend this over into the opening, and not scratch the jamb. That was the reason for the change.

Q. As I remember it, this boomerang, that is, the change from this straight arm, I think it is 17, to the curve, which you call a boomerang, was a suggestion made by Mr. McFadden while he was working with you?

A. Yes, Mr. McFadden did the job.

Q. That is the suggestion he referred to on the stand [283] the other day?           A. Yes.

Q. Were any of these boomerang Lo-Head sets that were sold, did any of them have a pin and slot two-piece cantilever arm?           A. No.

\* \* \*

D. R. MATLIN

called as a witness by and on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: D. R. Matlin.

Direct Examination

By Mr. Beehler:

Q. Mr. Matlin, will you tell us what your business is, please? [284]

\* \* \*

(Testimony of D. R. Matlin.)

A. Overhead door business.

Q. Are you an installer or manufacturer, or what?

A. I wouldn't classify myself as either one. I don't manufacture. I sell overhead doors. I have men who do the installing.

Q. In the installing they use jamb type hardware, is that right?

A. They use jamb, pivots, track, sectional roll-up and several others.

Q. How long have you been in that business?

A. Well, I have been off and on for over ten years.

Q. What is your present address?

A. Sir?

Q. Your present address, the address of your business.

A. 6549 West Boulevard, Inglewood. [285]

\* \* \*

Q. Do you recognize this gentleman sitting here? A. Which gentleman is that?

Mr. Beehler: Will you raise your hand?

The Witness: I think he was at my place some time ago, yes.

Q. (By Mr. Beehler): Do you recall telling him that you entered the premises which you now occupy in about July or August of 1948?

A. I thought I did. [286]

\* \* \*



(Testimony of D. R. Matlin.)

According to this then—I read a little hastily. I did move in before '49. This rent is paid from December 15, 1948, to January 15, 1949. I was trying to find a previous stub, but I can't find it in here.

Q. What was the amount of that rent that is indicated there?

A. It is funny, I pay \$75.00, but this thing here is only \$20.65. Let's see, I must have taken some off for some reason. I see here an invoice to Roy Sheet Metal. It was \$54.35. They probably did some work at the place which I took off from the check, because the total check is \$75.00.

Q. Who is Roy Sheet Metal?

A. Right next door to me, next door to me. According to this I must have moved in before December 14, 1949. [287]

\* \* \*

Q. You have purchased, have you not, garage door jamb hardware from Mr. Murphy, is that right?

A. Yes.

Q. How long have you purchased from him?

A. Well, I believe I started purchasing in 1947. At that time I think he was associated with Mr. McFadden, King Hardware, although I was under the impression that he was running the shop; at least, he gave me the impression he was managing it. I think King Hardware was really making it, and he was selling it, although my business was directly with Murphy, I gave him the money all the time, I think he was with McFadden, King



(Testimony of D. R. Matlin.)

Hardware. That was the latter part of '47 and early part of '48. [288]

\* \* \*

Mr. Beehler: Will you please mark these for identification, two photographs?

The Court: They may be marked for identification only.

Mr. Beehler: One is an over-all view and the other a view of a portion of the first view.

The Court: Exhibits R and R-1.

The Clerk: So marked, your Honor. [289]

(The photographs referred to were marked Defendants' Exhibits R and R-1 for identification.)

Q. (By Mr. Beehler): Mr. Matlin, do you recognize these premises pictured in Exhibits R and R-1? A. Yes, sir, those are my shop.

Q. Do you recognize the hardware there?

A. Yes, sir.

Q. Do you know whose hardware that is, who manufactured it?

A. This particular set was made by Murphy in my shop; at that time he was under agreement with me. He was supposed to make the stuff and I was going to sell it. But he didn't live up to his agreement, and when he left I was happy.

\* \* \*

Q. How long did Mr. Murphy work for you, do you know?

(Testimony of D. R. Matlin.)

A. He was working for me a couple of years before we moved in. He was hanging doors for me, installing doors.

Q. Do you recall when he first made those items of [290] jamb hardware, like pictured in the picture?

A. He started to make jamb hardware, at least I thought he was—it was really King Hardware—way back in 1947. So far as I can recollect, it was, but it wasn't exactly the same as this, the principal—the kicker plates are the same. I really don't know the difference between all the sets there are.

Q. This piece of hardware, in any event, which is shown in these two photographs, Exhibits R and R-1, are pictures of hardware which were installed on your present premises?           A. Yes.

\* \* \*

I was under the impression it was installed in August or September, 1948. At least, I told that gentlemen back there that (indicating). I knew this morning I would need it, and I picked up my old check stubs. This is the oldest book I could find.

The Court: Regardless, it was installed about a month after you moved into the premises?

The Witness: Yes, sir. It took us nearly a month to [291] put up that garage.

Q. (By Mr. Beehler): When Mr. Murphy worked for you in that shop arrangement, as you mentioned, or he manufactured the hardware as you needed it, is that right?           A. Yes.

(Testimony of D. R. Matlin.)

Q. How did you pay him then?

A. We had kind of a funny deal. I paid him in all kinds of moneys. As a matter of fact, he was broke most of the time and I would advance him money to get the machinery. He would pay that off and work for me, and would subcontract under a supposed license. I would pay him in every way, as a worker, as a manufacturer, as a salesman and subcontractor.

You take a fellow like that, you want to help them along every possible way, to keep them going. I had to do a lot of outside work.

Q. Will you refer to your check stubs from about, let's say, August of 1948 up to about December, and point out the stubs which show payments to Mr. Murphy?

The Court. I want to see those pictures.

Mr. Beehler: Yes, sir.

The Witness: Here is a check, March 5th, to Mr. McFadden. Here is a check to Earl Murphy, August 9th.

The Court: What year?

The Witness: 1948.

Q. (By Mr. Beehler): Subcontract No. 27, what would that indicate? [292]

A. Well, it would indicate the fact that he did some work for me.

Q. What number is that? What stub contract number? A. No. 27.

Q. Here is No. 15 on May 2, 1948.

A. He did all this—there was some before that.

(Testimony of D. R. Matlin.)

But we are not interested in that. You want Subcontract No. 24. Here it is.

Q. Subcontract No. 27, it says here.

A. Subcontract No. 27?

Q. Yes.

A. Subcontract No. 26, here we are. Well, he hanged a double jamb set for Mr. Kanowsky, 4120 Mansel Avenue; did some work for Lindley and hung some doors for Circus Center up on Linrock. That check was——

Q. The check was for \$17.50?

A. That was just for some work he did for me.

Q. Now, Mr. Matlin, will you again refer to your check stubs? I note here one indicating payment to E. Murphy in the sum of \$105.75 for Subcontract No. 28. Do you have any notation of what that might have been?

A. That was for Subcontract No. 28, \$128.00 less some hardware, \$105.75. He did a conversion job for Smith at 2220 Parnell and then he hanged some hardware in National-Sepulveda; we [293] did a project there, about 450 houses there.

He worked on Rosemead, Rosemont & Budlong Corporation. I think we used King hardware or Murphy hardware on that project. I don't know which was which. On National-Sepulveda he installed ten single jambs.

\* \* \*

Q. You have a notation on this project of "Hardware bill paid \$23.00." What would that mean?



(Testimony of D. R. Matlin.)

A. I bought hardware from him, as he manufactured it; I paid him cash for the hardware. [294]

\* \* \*

Q. (By Mr. Beehler): Now, Mr. Matlin, over the recess you have helped us with some of these check stubs. May I call your attention now to Stub No. 2603, dated November 24, 1948, to Earl Murphy, "For Loan for Punch Press \$200.00." Can you explain that?

A. Well, as I said before, he was always broke and his machine broke down and I loaned him some money to buy a new machine, a new punch press.

Q. The fact that the machine broke down, which necessitated loaning money for a new one, indicates to you, I believe, you told me, he was using one before.

A. Yes. You have to have a punch press to make that hardware.

Q. The punch press is used to make the holes, is it?      A. Yes.

Q. And the slots.

A. Well, I don't know about slots. I am no mechanic or machinist. I am not an engineer. I just sell hardware and install—have the boys do all the mechanical end.

Q. How long was it before this date of February 24th, as near as you can estimate, that Mr. Murphy was using the press that broke down?

A. Well, he never did buy that machine. I guess he bought secondhand machinery, in the first place, so I don't think it would hold up very much. I



(Testimony of D. R. Matlin.)

suppose probably his [295] old punch press probably was good for a couple of months or so; I don't know. [296]

\* \* \*

Q. Turning back again to Mr. Earl Murphy's use of the punch press, and the punch press, I assume, was on your premises, is that correct?

A. Yes, sir.

Q. The devices that he was using, the punch press would make, that was jamb type hardware of his particular design, was it? I am referring again to these photographs. Is this the hardware he was turning out by use of the punch press?

A. Well, he was turning out hardware for quite a while, but as I said before, I don't know. The hardware is Greek to me. It all looks the same to me. I don't know which is which. They all work the same way, and they all work on the same principle. I don't know whether this is what he has been putting out, or before or after.

Q. Calling your attention to the slot which appears on the angle iron up here, is it or is it not true, to the best of your knowledge, that was always the way that Murphy made the hardware that he made?

A. Well, I couldn't swear to that, not being a mechanic. I never paid any particular notice to that. I think Mr. [297] McFadden would be able to testify more truthfully. I would be more or less guessing.

Q. You told us during recess, did you not, Mr.

(Testimony of D. R. Matlin.)

Matlin, that with that Murphy hardware, it was always the same, so far as the way he made it? He always made it the same way, with a slot in it?

A. I don't know. I know he made jamb hardware that would always work the same way. I don't know whether he had a slot in there or whether he didn't. It was the same as what King made, the same hardware what King—I don't know when he started that slot or I don't know whether that slot was always in there or not; I couldn't say.

Q. Referring now back again, Mr. Matlin, to your first conversation with Mr. Jim Wooley, the gentleman here in court, it was true, was it not, when he first talked to you the first time he talked to you about when you might have moved into the establishment where these pictures were taken and that you thought it was in July or August of either 1948 or 1949?

A. I was under the impression it was in August, 1948. [298]

\* \* \*

Q. On the second occasion of your talking with Mr. Jim Wooley—I think he came back to you a second time—you said at that time, did you not, that you had reviewed the matter and that you told him it was in 1948?

A. I believe I did tell him that I was under the impression I moved in in August, 1948. And I was under the impression that the garage was finished about a month later, and the door was put in

(Testimony of D. R. Matlin.)

sometime either in September or October, that particular hardware here.

\* \* \*

But it seems like I was in there before that check, for the simple reason that I loaned him \$200.00 to buy his punch press. So, if I loaned to him in November I must have been in there in November, although I have no proof. I have no check to show that I [299] paid the rent. That is, I can't find the check.

Mr. Beehler: May I offer in evidence these two photographs, Exhibits R and R-1?

The Court: They may be received. [300]

\* \* \*

Mr. Beehler: I have here a sheet, current sheet of Tavart Construction. I see Mr. Varley in the court room.

I don't wish to burden the record with a lot of documents, but I would like to have Mr. Varley identify this as exemplifying the kind of instructions that are current in this business for installing jamb type hardware.

Mr. Varley, will you take the stand?

S. G. VARLEY

called as a witness by and on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: S. G. Varley.

(Testimony of S. G. Varley.)

Mr. Beehler: May this be marked as Defendants' Exhibit next in order?

The Court: It may be marked for identification only as Exhibit S. [305]

\* \* \*

### Direct Examination

By Mr. Beehler:

Q. Mr. Varley, will you state for the record your business connection?

A. I am manager of Tavart Company.

Q. You have been associated with the Tavart Company for how long?

A. Since it started in 1945.

Q. I show you, Mr. Varley, an instruction sheet, Defendants' Exhibit S for identification, and ask you if you recognize that sheet. If you do, will you tell us when it was printed?

A. I couldn't give any date, exact date, but the first one similar to this was printed—I think it was around in 1949. We made quite a few changes in that particular sheet. I wouldn't try to give a date.

Q. Is this type of instruction sheet one you customarily use and put in your sets of hardware for the guidance of somebody that is installing it?

A. We develop that sheet, yes, sir.

Q. This is your own development, this sheet?

A. Yes.

Q. By your own artists, I assume?

A. That is right.



(Testimony of S. G. Varley.)

Q. Prior to this sheet, did you have other [306] similar sheets?      A. We have many of them.

\* \* \*

Q. While you are here with us, Mr. Varley, will you tell us, as near as you know, when you first began to use this type of hardware, that is, with a single angle iron on the door and having a slot in the jamb plate, to which the cantilever is fastened?

A. 1945. [307]

\* \* \*

S. K. COULTER

called as a witness by and on behalf of the defendants, being first duly sworn, was examined and testified as follows.

The Clerk: Will you state your name, please?

The Witness: S. K. Coulter.

\* \* \*

Mr. Beehler: I wish to offer as the next exhibit, Patent to N. W. Smith, No. 2,569,351.

The Court: It may be received and marked Exhibit T. [308]

\* \* \*

Mr. Beehler: I wish to offer this brochure of prior art patents, to which notice has already been given to the defendants. There are 15 patents, bound together and numbered, 1 through 15, inclusive.

The Court: It may be received and marked Exhibit U.

\* \* \*



(Testimony of S. K. Coulter.)

The Court: We can have it marked Exhibit U-1, 2, 3, 4, 5, to 15.

Mr. Beehler: That will work out nicely.

The Court: It will be re-marked.

\* \* \*

The Court: Before we proceed, I want to ask counsel a question in regard to this exhibit. The witness testified [309] they have been making this kind of hardware with the slot since 1945. I don't know whether the witness intended to indicate anything other than just the slot. That was the question asked, just as to the slot. Or whether it was as to the adjustment.

Now, this so-called lever arm you have been talking about, at one time it was attached separately to the door.

In this exhibit it appears attached to the angle iron on top of the door. Now, am I to take it that this particular hardware was manufactured beginning with 1945 and the lever arm was attached to the angle iron on top of the door?

Mr. Beehler: No. That is not true. There was a point, somewhere between 1945 and the current date, when the so-called gusset plate or that little extra plate in there was added.

The Court: The only thing you have intended to bring out was the use of the slot for the adjustment?

Mr. Beehler: The use of the slot at the jamb plate.

The Court: For adjustment?

(Testimony of S. K. Coulter.)

Mr. Beehler: For adjustment.

The Court: That is the only thing you intended to bring out?

Mr. Beehler: By that witness, yes, sir.

The Court: All right. That is fine.

### Direct Examination

By Mr. Beehler:

Q. Mr. Coulter, will you tell us what [310] your business is, please?

A. I am in the garage door business. Installation only of built doors and installing—by “install” I mean hardware.

Q. How long have you been in that business?

A. It was established in 1938.

Q. You are licensed in California, I suppose?

A. Yes, sir.

Q. You belong to any builders' associations or contractors' associations?

A. Yes, I belong to the Contractors' Association in our local in San Gabriel Valley.

Q. Prior to your engagement in this business, had you any experience in hardware or, rather, experience as a carpenter or mechanic?

A. I was in the—I worked for construction work for Myers Bros. Construction Company.

Q. What kind of garage doors, or, what kind of garage door hardware, Mr. Coulter, have you installed?

A. Well, there is pivot, jamb, track, Lo-Head

(Testimony of S. K. Coulter.)

room pivot, Lo-Head jamb. I guess you could name a great many of them. The standard makes would be pivot and jamb and track type. I think that would cover most of what you would want to know.

Q. Can you give us an idea of the sum total of garage door hardware items you have [311] installed?

A. Well, in the neighborhood of 10,000 sets, I would say. I never get down and figure that up. I approximate that.

Q. Now, I will name these types of manufacture. You may answer yes if you install them. Front track type.

A. No.

Q. Stanley. A. No.

Q. Holmes. A. Yes, sir.

Q. Tavart. A. Yes.

Q. Winchel. A. Yes.

Q. Atlas. A. Yes.

Q. Osborn. A. Yes.

Q. Vulcan. A. Yes.

Q. Ace. A. I wouldn't be too sure.

Q. Sturdee. A. Yes.

Q. In the installation of garage doors, hung on jamb type hardware, about how much tolerance do you work with? [312]

A. I work on Jamb Type and all types, we work at a tolerance of an eighth of an inch, as a maximum. The Jamb Type, it is really worse to even allow that much.

Q. When you refer to an eighth of an inch tolerance, explain that.

(Testimony of S. K. Coulter.)

A. In your measurement and setting of brackets, and such things as that. That is on your pivot points and those things that are very essential to the operation of the door.

Q. Referring, Mr. Coulter, to the usual Jamb Type hardware, which Exhibit 2 is exemplary of, will you describe just briefly the steps in setting that on a door and hanging the door in the doorway of a garage?

A. Well, we would, as the first step, or, my first step is the plumbing of your opening and leveling your head, to be sure your building is properly built, before you start in. Then you take your measurements down from the underside of your head and that depends upon, that measurement depends on what type of hardware you are hanging.

You get that point and your door is then—you drill your holes, and then your door is set up in the opening plumb, with space under and on each side.

Q. When you say, “drill holes,” you mean drill holes in the jamb?

A. In the jamb, that is right. Then your hardware, the pivot bracket is attached to your jambs and with your [313] door plumb you attach your angle in this particular hardware. With different hardware it would be different. This particular one, you attach the angle and the long angle which goes on the door, and then checking again to see that your door is plumb, you fasten up your connecting links, and add your spring and lift your door. Con-



(Testimony of S. K. Coulter.)

nects your spring to the fastener at the bottom of the jamb, and from then on it is an adjustment which would be hard to tell here, or to anybody else. It is something that each door has, its own adjustment.

Q. Is it possible, by the use of this type hardware, to so hang the door, in the first instance, that the door will be plumb without further adjustment, once the hardware is fastened to it?

A. Yes, the door is plumb at first, and you fasten it up plumb and put everything plumb.

Q. Now, Mr. Coulter, you are familiar, I believe you said, with the Sturdee hardware?

A. Yes, in some degree, of all of them.

Q. Do you know how the hinge is adjusted for length in that hardware?

A. What was that?

Q. How the length of the cantilever arm is adjusted, for length.

A. Yes, sir.

Q. You are familiar, are you not, with the [314] Tavart hardware?

A. Yes, sir.

Q. You recognize that the adjustment is at the plate, a slot in the plate of the Tavart hardware?

A. Yes, sir.

Q. You are familiar, are you, with the Winchel hardware?

A. Yes, I have hung the Winchel hardware; I understand it.

Q. You are familiar with the adjustment as being in a slot at the end of the cantilever, which fastens to the angle iron on the garage door?



(Testimony of S. K. Coulter.)

A. Yes, sir.

Q. Are you also familiar, Mr. Coulter, with the Murphy type hardware? Is that included in any you——

A. I don't believe so, as being put up under that name; I couldn't say I was.

Q. I show you a photostat, Mr. Coulter——

Mr. Beehler: I request this be marked as defendants' exhibit next in order, for identification.

The Court: It will be marked for identification as Exhibit V.

The Clerk: So marked, your Honor.

(The document referred to was marked Defendants' Exhibit V for identification.)

Q. (By Mr. Beehler): Will you tell us, briefly, Mr. [315] Coulter, what is shown on this photostat?

A. Well, this is a drawing of different types of jamb hardware, showing them in different positions; completely open and partially open.

Q. That photostat is illustrative as to comparison, is it not?      A. Yes.

Q. It was made with your approval?

A. Well, I saw it in your office, yes.

Q. Now, referring to that photostat, which you have before you, Figure 1 is a figure of the Fowler Patent in suit, is it not?      A. Yes, sir.

Q. The figure immediately to the left of it is an illustration of the old style Tavart hardware?

A. Yes, sir.

Q. The view next, to the left, is an illustration

(Testimony of S. K. Coulter.)

of some type of hardware shown by advertisement of the Coffey Overhead Doors, Inc.?

A. It is one of the older types of hardware.

Q. The figure on the far left is an illustration of the Winchel hardware, is that correct?

A. Yes, sir.

Q. Now, Mr. Coulter, referring to Figure 1, which is the Fowler hardware, tell us how that particular hardware can be [316] used to adjust the door, to make it plumb.

A. Well, I believe you mean the——

Q. The one on the extreme left.

A. So it would take care of both the thickness and the door, to plumb the door.

Q. Yes.

A. Your lever arm which is marked 14, I believe is the number of it, is adjustable. The slots in the center, which either lengthens or shortens, whichever you wish to bring your door to, either in or out——

Q. That changes the effect of distance between what points on that drawing?

A. Between the pivot points on the lower—the lower pivot on your jamb plate, and the pivot on your gusset plate, in this particular—I heard that name and I think it is pretty good——

Q. Now, referring to the illustration of the old style Tavart, will you explain briefly how the adjustment, if any, is made on that part there for straightening out the verticality of the door?

A. This drawing wouldn't show it, but it does

(Testimony of S. K. Coulter.)

have a slot in the plate, which vertical slot allows this to be pulled up or lengthened out, which brings your door forward or backward.

Q. You may, if you choose, Mr. Coulter, mark the points [317] where the effective distance needs to be changed, to make an adjustment.

A. Well, your door in a down position would be the proper way to be able to explain this. In other words, you could pull your door either forward or backward, by raising——

Q. The bottom of the door?

A. ——the bottom of the door either forward or out, either one, by raising it in this slot here (indicating). In other words, that would bring it in by raising this slot.

Q. May I mark the slot you referred to with a reference character of 10, is that correct?

A. Yes.

Q. And the other pivot point, if I may mark with a character 11, is that correct?

A. Yes, sir.

Q. It is the distance between those two points which needs to be changed, I believe you said?

A. Yes, sir, that is right, bringing it back in; that is right.

Q. Skipping the Coffey one for a moment and referring to the Winchel door, will you explain how that particular kind of hardware would be used to straighten out the verticality of the door?

A. They have it in this figure, which shows it the best—— [318]

(Testimony of S. K. Coulter.)

Q. Figure 4.

A. They have this particular plate, Figure 5, yes. This particular plate is slotted and bolts it to this angle (indicating).

Q. The particular plate you refer to is an angle iron?  
A. Well, it is a flat bar.

Q. A flat bar?

A. Yes. It bolts to the angle iron on the door. It has the angle iron slotted and bolts come through this plate, and by raising or lowering that they either pull the door in or out.

Q. That changes the effect of the distance between what points? You may mark on the drawing if you wish.

A. It would be the distance between here (indicating).

Q. Here (indicating)?

A. Here and here on the door, it is down in a vertical position (indicating).

Q. By the first "here," may I mark it "10"?

A. Yes.

Q. And the second "here"——

A. Up here or up here (indicating).

Q. Would be at what point?

A. This is right in here (indicating). It would be where your slots and your bolts are.

Q. If I draw a line in that fashion at the junction of [319] this gusset plate and the green bar——

A. That is right.

Q. ——that is the other extreme?  
A. Yes.

Q. And I mark it 11, is that correct?



(Testimony of S. K. Coulter.)

A. Yes. [320]

\* \* \*

Q. I wish to refer you now, Mr. Coulter, to Defendants' Exhibit C-4, which is captioned, "Coffey Overhead Doors, Inc." Will you examine that exhibit, Mr. Coulter, please?

A. (Witness complying.)

Q. Do you recognize there the two different types of jamb type hardware?

A. One type of jamb and one of pivot.

Q. Excuse me, two types of garage door hardware.

A. That's right. [324]

Q. The type on the left is what kind?

A. Pivot type.

Q. And the type on the right is what type?

A. Jamb type.

Q. Now, I call your attention, Mr. Coulter, to the legend underneath the illustration on the right-hand side, if you will count down to line 7. I have indicated those lines there to help a little bit. Will you read there into the record what it says, beginning with the words, "Adjust door in opening"?

Mr. Fulwider: Starting where?

Mr. Beehler: Line 7.

The Witness: You are starting in the middle of the sentence. Okay. "Adjust door in opening by moving the long arm up or down."

Q. (By Mr. Beehler): You might read through to the finish of that legend, if you will, please.

A. Excuse me. "When set be certain to have this bolt tight. Now raise the door and prop it open;



(Testimony of S. K. Coulter.)

attach the springs to arms and attach spring anchors to jambs with enough of the eye bolt extended through for a nut. Adjust door.”

Q. Now, referring back to the first of that quotation, “Adjust door in opening by moving the long arm up or down,” in that easy jamb model illustrated there, how would [325] that adjustment ordinarily be made?

A. Well, it doesn't show a definite detail as to how it would be, but the arm had to be somewhere, it had to have a slot to be able to move that up and down, or some manner of being able to move it up and down. It doesn't just show it in the detail, but there would have to be some way or other to do it.

Q. If there were no provision for moving it up and down, there would be no sense in that statement, is that your contention?

A. That's right.

Q. Now, the last sentence, which says, “Adjust door,” do you have an understanding of what that would mean?

A. Well, that could be your spring adjustment, or a lot of different ways, if necessary, to make a door operate. Each one individually is an item in itself.

Q. Now, Mr. Coulter, referring to the illustration on the left-hand side with the picture captioned, “Easy pivot model,” in your door-hanging experience, you said, I believe, that you have hung pivot models of doors?

A. Yes, sir.

(Testimony of S. K. Coulter.)

Q. Have you seen any pivot models of that general construction? A. Yes, sir.

Q. Have you hung pivot models of that general construction? [326]

A. I haven't hung, but I have taken out quite a few of them.

Q. Do you understand, Mr. Coulter, how that type hardware is attached to the door?

A. Yes, sir.

Q. Is there any adjustment in that type of hardware? A. Yes, sir.

Q. Would you explain that adjustment, please?

A. This is in the arms, both top and bottom, in the wishbone arm, there is two channel irons, we call them, one lays inside of the other one, and they are slotted so they can be set back and forth and locked there with nuts.

Q. Is it possible to shift the door a little bit to make it vertical by the adjustment of one or another of those what you call the wishbone arms?

A. That would be the purpose of them, because it would allow for thickness in the door and to adjust your door for perpendicular.

Q. Now, will you refer again, Mr. Coulter, to the photostatic sheet presented here yesterday as the last defendants' exhibit? Is the Coffey jamb type hardware which you just referred to the same as that picture third from the left on the photostat? Is that correct?

A. I would say it was. [327]

Q. Now, Mr. Coulter, will you refer, please, to

(Testimony of S. K. Coulter.)

your copy of Wolf patent No. 2,166,898, which is the fifth patent in the book presented in evidence?

A. Yes, sir.

Q. Will you explain briefly the type of hardware that you find there, which I believe is pictured most clearly in reference to Fig. 2?

A. It is very similar to the pivot type we had on the Coffey. The arm adjustments are the same. The channel irons, as near as this print can show it, looks to be.

Q. Could the door hung by hardware as pictured in the Wolf patent be adjusted so as to make it vertical in the doorway? A. Yes, sir.

Q. That would be by the adjustment of the arms, I believe you just said?

A. The adjustment of the arms slotted. There is one bolt there you loosen to adjust it.

Q. And the adjustment on those arms with the slot and bolt is variable to any distance at all within the limits of the slot, is it not?

A. That's right, to take care of offsets, also, to the wall where the arm has to be longer for this type hardware.

Q. Now, refer, please, to Holmes patent No. 2,228,314, [328] which is No. 9 in the brochure of patents. By reference to Fig. 1, which I believe is clearest there, will you explain how that particular type of hardware there pictured can be adjusted, is adjustable?

Mr. Fulwider: Which one?

Mr. Beehler: Holmes No. 2,228,314.

(Testimony of S. K. Coulter.)

Q. Will you just hold your answer a second until counsel finds his copy?

Mr. Fulwider: That is No. 9 of the book?

Mr. Beehler: No. 9 in the book, yes.

Q. Will you proceed, please, Mr. Coulter?

A. This is rather indefinite as to just the exact way, but from appearances, I would say there were set screws of some sort that you loosen for adjustment to your length for your offsets, and the width of the door and plumbing, and so forth.

Q. May I call attention, to assist in this, to page 2 of the patent, column 1, beginning line 22, which reads:

“The arm 4 consists preferably of two forks, including an upper fork for a and a lower fork for b, and these forks are preferably made extensible; and in the present construction, include sleeves 9a and 9b that telescope over the ends of the forks adjacent the [329] door 10. These extensions 9a and 9b can swivel on the forks 4a and 4b, and are preferably provided with means such as set screws 11 for securing them rigidly in any position desired.”

With the aid of that explanation which appears on the face of the patent, can you help to explain how the operation of the hardware is?

A. Yes. As I say, it appears to be that there are two set screws there on each arm which you loosen, which allows you to either extend the hardware further to the wall, or either extend the door



(Testimony of S. K. Coulter.)

forward or back or perpendicular, or whatever is necessary.

Q. If you were to extend it forward and back, you adjust the arms on both the left-hand and right-hand side of the door, is that correct?

A. Yes.

Q. And to shift it with relation to the wall, you make another adjustment?

A. Well, no. The same adjustment would give you your offset, because it has to lengthen the arms, also. If your adjustment is further to the side, it has to lengthen your arms also.

Q. You can lengthen one arm more or less and the other arm will compensate for it?

A. Yes, that's right. [330]

Q. Now, refer, please, to Peck, No. 2,233,638, No. 10 in the brochure, and having reference more particularly to the figure 1, will you explain how that type of pivot hardware can be adjusted, if it can be?

A. At the pivot point, they have a——

Q. You refer to the reference character 7?

A. Yes. Well, it is Fig. 6 here. That gives you a detail of the pivot itself right below the patent or the main drawing. That is the pivot itself.

Q. Yes.

A. It has set screws in both the top and side, which gives you—by loosening those, to get both an adjustment in length and an adjustment for angle, because the arms fit in there rather loosely and the set screws hold them in shape.



(Testimony of S. K. Coulter.)

Q. Is it or is it not possible to change the vertical position of the door by the adjustment of the position of either the arm 16 or the arm 17a? That applies to both the arms, is that your answer?

A. Yes, sir.

Q. Will you refer now, please, to Holmes patent No. 2,259,819, No. 12 in the brochure? I call attention, in addition to Fig. 1, to Fig. 6, which is helpful in understanding the disclosure. By reference to those figures, Mr. Coulter, will you explain what adjustments are indicated as possible, if any, in the Holmes patent just referred to?

A. Adjustments in what way? [331]

Q. With respect to the arms which hold the garage door, or the door.

A. The adjustment—there are two adjustments, as a matter of fact. You have adjustment in the pivot point with two set screws, and then you have adjustment at the end of the arm which lengthens them.

Q. You are referring now to which arm, Mr. Coulter?

A. I am referring to—let's see. 27, I believe. Well, I don't know. They give so many numbers here. It is the top arm, anyhow.

Q. The arm 27?

A. This also has an adjustment where it fastens to the door for offsetting to the side.

Q. Now, will you refer to Fig. 6 and explain, if you will, such adjustment as is possible in the arm 15 or the arm 46, as there numbered?

(Testimony of S. K. Coulter.)

A. Yes. It has the sleeve adjustment at the bottom, also with two set screws for lengthening and shortening, or whatever you want to do. The top—I couldn't tell just what that is, but I believe that is more of an angle for moving to the sideways than anything else.

Q. By reference to the set screws, you refer to the screws indicated by the character 51, is that correct? A. Yes, sir.

Q. Would or would that not change the [332] effective length of the particular arm?

A. Yes, sir, it would. It would lengthen it or shorten it.

Q. Now, please refer to Violante patent No. 2,425,905, No. 14 in the brochure.

A. Yes, sir.

Q. Will you, Mr. Coulter, by reference to the drawings in that patent, explain such adjustments as you find?

A. You are speaking of adjustments for lengthening, and so forth, as we have been?

Q. Yes, the adjustments with respect to the arms of that hardware.

A. On Fig. 3, which is at the pivot point or is the pivot, you have an arm slotted with a washer bolt to tighten it, and a set screw in the end to move it forward or backward, allowing either way, and on Fig. 6, at the point it fastens to the door, you have another angle iron there with a pipe or—I believe it is pipe, flattened at the end, fastening to it with a slotted joint.

(Testimony of S. K. Coulter.)

Q. By the use of one or another of these slots, is it or is it not possible to change the vertical position of the door in the doorway? A. Yes, sir.

Q. Would you indicate which of the slots could be used for that purpose? [333]

A. Both could be used for that purpose.

Q. That is the slot in either end of the arm?

A. Yes, sir.

Q. And the slot in either arm?

A. Yes, sir.

Q. Now, refer, please, to Wread, patent No. 2,441,742, No. 15 in the brochure, and explain there such adjustments as you find in either or both of the arms which support the door.

A. You have two different types of hardware there. Fig. 1 is the conventional pivot type with the spring in the bottom, and Figures 2 and 3 and 4 are low headroom double pivot type.

On the Fig. 1, it would be a sleeved arm, one piece of pipe sleeved into another with a set screw for adjustment for length.

Q. And with respect to Fig. 2?

A. It is the same on both arms.

Q. That is, the length of both arms can be changed by sliding one telescoping member in the other? A. Yes, sir.

Q. Would or would not that be effective in changing the vertical position of the door in the doorway? A. Yes, sir.

Q. Could you use either arm to do that? [334]

A. Yes, sir.

(Testimony of S. K. Coulter.)

Q. Will you now refer briefly, Mr. Coulter, to Smith patent No. 2,569,351, which is not in the brochure, but which was introduced separately yesterday, and explain what adjustment is there that you find?

A. You are speaking yet of adjustment of the vertical position of the door?

Q. That is correct.

A. The slot in the pivot bracket itself which allows the b arm, as we call it, to be raised or lowered to cause the door to be vertical in the opening.

Q. And that changes the effective length of the cantilever arm, does it not?

A. It affects the—it raises the arm in the pivot position—or in the pivot bracket.

Q. Now, will you lay before you, Mr. Coulter, the Fowler patent in suit? I suggest that you might refer to the photostat we have introduced. I call attention to the figure 1 of the Fowler patent on the right-hand side, and the Tavart illustration next, to the left of that, and the Coffey illustration next on the left. Will you count, please, Mr. Coulter, the number of parts and the holes, the hole operations, in the Fowler patent? Do you have a notation of that?

A. Well, offhand, the exact—you are guessing at [335] some points as to what type of connection is being used, three different types could be used, but on the Fowler patent you have approximately 40 different parts.

Q. That is counting parts and holes necessary?



(Testimony of S. K. Coulter.)

A. Bolts and washers and everything.

Q. And in general those parts constitute what kinds of structure?

A. What was that again?

Q. Nuts, bolts, washers, or what?

A. Well, there is for your pivots and your assembly of the entire hardware, rivets or fastening the different points together, you have your pivot bolts and your spring fastenings—I don't believe you see figured the spring fastening in that at all. You have your bolts for your connecting arm, and washers, figuring they would use a washer on it and a bolt on the other side, a lock and a washer and a nut on two different sides—in others words, double that.

Q. By way of comparison, how many corresponding parts did you count in the Tavart?

A. 24, approximately, on this particular picture you have here.

Q. And in the Coffey type, as nearly as you could count it from what would have to be there to make it work, how many parts did you find?

A. 26. [336]

Q. I believe you said first that there were 40 in the Fowler.      A. That's right.

Q. May I refer you now, Mr. Coulter, to Plaintiff's Exhibit 4 for identification, which is the claims of the patent in suit? Referring first to the Fowler disclosure, which is on the right of that photostat sheet, which I believe we will find shows all of the elements recited in the claim, and taking



(Testimony of S. K. Coulter.)

claim 1 by way of example, I read, as tabulated by plaintiff:

“A bracket (11) for mounting to the door frame.”

You find that, I believe.           A. Yes.

Q. “A master arm (12) pivotally mounted intermediate the ends thereof to said bracket.”

You find that?           A. Yes, sir.

Q. “c) Means for pivotally connecting one end of said arm (12) to the door adjacent one edge thereof, said master arm being movable to position an intermediate portion of the door within the door frame.”

You find that?           A. Yes. [337]

Q. “d) A link (14) of adjustable length.”

Do you find that?           A. Yes.

Q. “e) A pivot pin pivotally connecting”——

Mr. Fulwider: I didn't catch it. Where is he finding these things? In the Fowler drawing?

The Witness: In Fowler.

Mr. Beehler: In Fig. 1 of the Fowler drawing.

Mr. Fulwider: Fine. Thank you.

Q. (By Mr. Beehler): “e) A pivot pin pivotally connecting a first end of said link to said bracket at a point fixedly spaced from the pivotal mounting of said arm to said bracket.”

Do you find that?           A. Yes, sir.

Q. “f) Means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the

(Testimony of S. K. Coulter.)

pivotal connection between said arm and door, said link controlling the angular position of said door as it moves with and relative to said arm between open and closed positions.”

Do you find that?           A. Yes, sir.

Q. “g) Means (slots 14c and pins 15) for [338] adjusting the length of said link while the afore-said intermediate portion of the door is within the door frame to thereby cause the door to lie in a vertical plane within the door frame.”

Do you find that?           A. Yes, sir.

Q. “h) And means including a tension spring (17) for interconnecting the free end of said arm and the lower portion of the door frame for applying an upwardly directed force to the door.”

Do you find that?

A. Spring 17? It must be the bracket connecting the spring.

Q. I think you will find a reference character 17 to a little fragment of a spring.

A. That is the spring itself.

Q. Yes.           A. But this is the connection.

Q. The notation of Exhibit 4 shows 17 in parentheses.

A. 17 is the spring itself, if that is what they have reference to there.

Q. All right. Now, going back to item a and having reference now to the Tavart illustration and Winchel and Coffey illustrations, I read again:

“a) A bracket for mounting to the door [339] frame.”

(Testimony of S. K. Coulter.)

Do you find that on the other illustrations?

A. Yes, sir.

Q. "b) A master arm pivotally mounted intermediate the ends thereof to said bracket."

Do you find that on those? A. Yes.

Q. "c) Means for pivotally connecting one end of said arm to the door adjacent one edge thereof, said master arm being movable to position an intermediate portion of the door within the door frame."

Do you find that? A. Yes, sir.

Q. Do you find that on the others?

A. Yes, sir.

Q. "d) A link of adjustable length."

Do you find that on the others?

A. We find—it varies a little, but we find it in the same results. It is not the same.

Q. Will you explain that statement, Mr. Coulter?

A. Well, that particular question leads into the next one, which shows a different hook-up as to your bracket here. This particular one adjusts in the center.

Q. "This particular one"?

A. 14 of the Fowler patent. [340]

Q. Fowler?

A. Yes, Fowler, while Tavart adjusts at the top end in the pivot bracket itself, and also the Coffey, but from the other references, not by this picture, but by other references, it does the same.

The Winchel adjusts at the bottom of the arm on the angle that fastens to the door.

(Testimony of S. K. Coulter.)

Q. Now, then, you have referred to an explanation of parts d and e of the patent claim tabulation, I believe.

Now, referring to item F:

“Means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the pivotal connection between said arm and door, said link controlling the angular position of said door as it moves with and relative to said arm between open and closed positions.”

Do you find that in the others of the illustrations?

A. The pivot point would be the same—yes, the same all the way through. On the Winchel, the pivot point would be the same, even though the gusset plate would move.

Q. Now, refer to item g:

“Means for adjusting the length of said link while the aforesaid intermediate portion of [341] the door is within the door frame to thereby cause the door to lie in a vertical plane within the door frame.”

Do you find that in all of the other illustrations?

A. Well, as I stated a few moments ago, the adjustment would be different, because 14c and 15 are here, while in the Tavart and the Coffey, it would be in the bracket itself at the top end, and in the Winchel at the bottom where it fastens to the angle of the door.

Q. Is it or is it not true that the purpose of all



(Testimony of S. K. Coulter.)

these adjustments is to cause the door to lie in a vertical plane within the door frame?

A. Yes, sir.

Q. Referring to item h:

“And means including a tension spring for inter-connecting the free end of said arm and the lower portion of the door frame for applying an upwardly directed force to the door.”

Do you find that in all of the others?

A. I believe that is a little bit confusing there. We said it was a spring a little bit ago. I believe it is the fastener on the end of the arm we have reference to, and they all do have means for fastening to the end of the arm.

Q. And they all have a tension spring?

A. That's right, they all have a tension [342] spring.

Q. And is it true, also, of them, all four illustrated here, there is some means or other for changing the tension of the spring?      A. Yes, sir.

Q. Will you explain briefly, Mr. Coulter, what there is in the initial construction of a door or the initial construction of a building which makes some adjustment advisable?

A. You are speaking of the jamb type hardware?

Q. Of the jamb type hardware particularly.

A. Well, your doors are built different thicknesses. Again, though, we wouldn't say it is a must, because it wouldn't have to be a must. If the doors and the jambs were built so that they were identical,



(Testimony of S. K. Coulter.)

level on the back side, a hardware could be built which does not take an adjustment to it, as far as your adjustment forward and backward, but each individual one would have to be built identical. Otherwise than that and difference in the thickness in the door and thickness of the jamb, we have to have some way to compensate for it.

Q. I call your attention now, Mr. Coulter, to Plaintiff's Exhibit 10 for identification, I believe, "Economo-Jamb Instruction Sheet," and with reference to item No. 1 on that figure, I read this legend:

"Thickness of door. The distance T from the inner face of the hardware to the inner face [343] of the jamb should not be more or less than one-half inch the thickness of the door."

Does that instruction apply equally well to all of the types of jamb hardware that you have had reference to here?      A. Yes.

Q. Now, reading from item No. 2, well, rather, reading further on the bottom of item No. 1:

"Measure down on jamb  $20\frac{1}{4}$ " plus door thickness from the lower face of the header and mark this position with a square. This will locate the upper edge of the bracket."

Does that have reference to all of this type hardware?

A. Well, they wouldn't have the same measurements. It depends on your bracket and the length of your power arm, and so forth. That would vary with different hardware.

(Testimony of S. K. Coulter.)

Q. Would it vary, also, with the size of the door to be hung?

A. Yes, sir, the height of the door.

Q. The height of the door? A. Yes.

Q. Turning now to item No. 2 on the exhibit, I read this legend:

“With  $\frac{3}{8}$ ” lag screws, bolt the bracket in [344] place with its front face even with the face of the jamb and with its upper edge  $20\frac{1}{4}$ ” plus door thickness down from the header. Repeat this operation with the bracket on opposite jamb.”

That is true of all the types?

A. Except for the difference in measurements, they would be similar. This particular type could have been a little more offset. I don't remember exactly for sure now what that was.

Q. By “this one,” you refer to the Coffey?

A. The Coffey one could have been in a little further.

Q. Reading from the legend on the bottom of illustration No. 3:

“Place the door in the opening. Shim beneath the door  $\frac{1}{4}$ ”. Now swing the power arms toward the door so as to bring the angles into engagement with the vertical frame members at the edges of the door and bolt these angles to the door with the short  $\frac{5}{16}$ ” lag screws. The edges of the angles should be  $\frac{3}{8}$ ” in from the edge of the door.”

Would that be true of all the different types?

A. It would be similar. The variation from the

(Testimony of S. K. Coulter.)

edge of the door might vary on them, but otherwise they would be [345] the same.

Q. If the variation were anything, would it not be a fraction of an inch?

A. It would be part of an inch, yes.

Q. "Next, connect the loose cantilever arms with  $\frac{3}{8}$ " carriage bolts as shown in secondary view."

Do you find that in the others or any counter-part of it? A. Which arm is it?

Q. The secondary arm.

A. Fixed where, now?

Q. I will read it again.

"Next, connect the loose cantilever arms with  $\frac{3}{8}$ " carriage bolts as shown in secondary view."

A. Well, you wouldn't have that same set-up in the other hardware. You wouldn't have a carriage bolt to fasten in any of them. It would be a pivot bolt in this one. This one would be a pivot bolt and the Winchel model could have carriage bolts.

Q. No. 4, reading:

"When both edges of the door have been secured to the hardware, swing the door up into raised position. Then place power equalizer on power arm. For sequence of assembly, refer to [346] inset."

Do you find that in the others?

A. They would be all very similar. The difference would be in your type of fastener, would be all. Otherwise, it has the same results on all of them.

(Testimony of S. K. Coulter.)

Q. By "type of fastener," you mean how the spring is fastened to the power arm?

A. To the power arm, that's right.

Q. Now, referring to No. 5 of the exhibit:

"Install spring by connecting top with 'S' hook through lower hole in power equalizer and by connecting bottom with chain and lag screw assembly; position of lag screw is determined by stretching spring approximately 2"."

A. It would vary on the Tavart and the Winchel. They are fastened with a pin at the bottom while the Coffey has a bracket there on the top. It is a different fastener, but it is the same results, we will say. It is a different type fastener pin.

Q. Referring again to the bottom of the page of this Exhibit 10, on the lower left-hand side, I read:

"Note: It is necessary to keep same tension on springs at all times, therefore, if bolt is moved up arm, then extra links should be used [347] in chain at bottom of spring and vice versa."

Would that be true under all circumstances illustrated here? A. Yes, sir.

Q. Among these different schemes of adjusting the door in vertical position, do you have any preference for one over another in actual practice, from the door hanger's point of view, I mean?

A. I have no preference. We use the Tavart hardware mostly but, offhand, I wouldn't say there was a preference to any of them.



(Testimony of S. K. Coulter.)

Q. Do you find any one easier to adjust than any one of the others in your practice?

A. Well, the Tavart and the Coffey would take one bolt where the other two took two. There would be some preference there. Naturally, if you can use one instead of two, there is a preference.

Q. One on each side?

A. Yes, sir, that's right.

Q. Then there would be a corresponding doubling up on the opposite piece of hardware on the other side of the door?           A. Yes, sir. [348]

\* \* \*

Cross-Examination

By Mr. Fulwider:

Q. Mr. Coulter, I believe yesterday you said that you had had experience in installing a number of different kinds of hardware?           A. Yes, sir.

Q. I won't list them all here. I ask you this question, however: Do any of them have what has been referred to as a two-piece cantilever arm except the Sturdee? By two-piece, I mean the arm whose length can be changed similar to the Sturdee which we have been talking about?

A. In jamb type hardware, no.

Q. In jamb type hardware, that's right.

A. No, sir.

Q. Now, on this matter of tolerance, I think you said that you needed rather close tolerance, particularly for jamb type. Is that about  $\frac{1}{8}$  of an inch? [349]           A. That's right.



(Testimony of S. K. Coulter.)

Q. What is that?

A. If you drop your brackets on your arm that much or more, you get a door that tips in, or vice versa, tips out, which will run the water inside the garage or looks bad, either way, so it is quite essential. In fact, we have found that in all our work, pivot and all, that close tolerance is necessary.

Q. That is, a small change in that pivot distance makes, as I understand, a relatively larger change in the position of the door itself, say the eighth of an inch, the maximum tolerance you mentioned, that much difference at the bracket might make a difference of an inch or maybe a half inch?

A. It makes quite a bit of difference, and, also, if you make it an eighth of an inch on one side and an eighth of an inch on the other side, you get a quarter of an inch, and that doubles up eventually in your actual operation of the door and throws it off better than a half inch.

Q. I assume that for these doors to be satisfactory, they have to be able to stand fairly rough treatment?

A. Yes, sir, I would say so.

Q. A small variation or out-of-adjustment, mal-adjustment, in the pivot area on the bracket might result in enough change in the alignment of the door to make it unsatisfactory? [350]

A. It would be off plumb, and so forth, and cause it to rub, and such things as that.

Q. As I understand your discussion this morning, in the Tavart set, this adjustability for vertical position is obtained by shifting that pivot, the upper

(Testimony of S. K. Coulter.)

pivot, or the pivot connection of the cantilever arm at the jamb bracket; that is correct?

A. Yes, sir.

Q. In the Winchel type, they obtain this vertical adjustment, shall we call it, by shifting the lower pivot point, that is the pivot point between the cantilever arm and the door itself?

A. Yes. It would amount to that because they would move the gusset plate, which would change it, that's right.

Q. And in the Sturdee type, the vertical adjustment is obtained by changing the length of the cantilever arm itself?      A. That's right.

Q. Without shifting the position of either of the pivots?      A. That's right.

Q. In the Tavart type, the upper pivot between the cantilever arm and the bracket, that is the pivot that slides in that bracket slot, that has to take the full shock, we will say, of a door being slammed, does it not? [351]

Let's ask it this way: The pivot point in any of the sets of hardware absorbs a certain amount of shock in rough treatment of the door?

A. In putting it down, none of them take the treatment, because you have your stops on the door which stop your bounce, but going up, your cantilever arm takes the rough treatment, right.

Q. That's right. In your opinion, is there any possibility that that slot, or that slot and pivot connection in the Tavart slot and pivot connection at

(Testimony of S. K. Coulter.)

the bracket, might get out of adjustment with very rough treatment, a hard upper bang?

A. Yes, it could be. That could work loose, as far as that is concerned.

Q. And if they do get out of adjustment, then, of course, that changes the adjustment of the door itself?

A. It changes the perpendicular of the door.

Q. Yes.

A. In fact, it will not only do that, but usually they just fly back and forth.

Q. In your experience, have you ever had any of those doors go out of adjustment from any such treatment?

A. I don't know whether you would call it rough treatment. As a general rule, you find that something happens, they have not been properly tightened or somebody else [352] has fooled with them, and then they are not tightened tight enough, and then they are loose, and they move up and down in the slot.

Q. The Winchel type hardware, as I understand it, according to the testimony of Mr. Winchel here the other day, and I believe the exhibits show it, has a horizontal slot there in his jamb bracket where his upper pivot hooks on. Will you examine that? I might show you one of the exhibits here.

A. Yes, I have——

Q. Will you look at one of these exhibits? This Exhibit G shows it very well, which is one of Winchel's hardware. He has a horizontal slot, which

(Testimony of S. K. Coulter.)

has been numbered 15 here in this Exhibit G. You are familiar with that, are you?

A. Well, yes, we have used some of them.

Q. Now, what function, if any, does that horizontal slot have?

A. It would give you a certain amount, not as much as the vertical slot, but it would give you a certain amount of change in the position of your door, but very little. It isn't used—Winchel has used that more recently. Otherwise than that, I personally haven't thought too much of it, if you want the truth.

Q. In other words, in your opinion, it didn't do much? [353]

A. No. That's right.

Q. I believe he stated here the other day that he still uses that horizontal slot in all of his hardware, so the illustration of Winchel in your Exhibit V, that big photostat, which is illustrated in Fig. 4 towards the left, that pivot point which has the numeral 10 on it should show, then, a small horizontal slot at 10 to be accurate, should it not?

A. Will you repeat that again?

Q. Fig. 4 in your big Exhibit V, which illustrates the Winchel—

A. Yes.

Q. —that pivot point shown in the red cantilever arm to the yellow jamb bracket, which has a numeral 10 attached to it, there should be a small horizontal slot there, should there not, to have that illustration be accurate?

A. If this particular hardware did have a slot, yes, it should be. I couldn't say yes or no on that,



(Testimony of S. K. Coulter.)

because I wouldn't know. I wouldn't know but what they made some without it. I can't answer that.

Q. You don't know whether all of their hardware has had a horizontal slot or not?

A. No, absolutely not. I couldn't possibly know.

Q. Do you recall whether or not you have seen any Winchel hardware without the horizontal [354] slot?

A. I bought—it has been quite some time ago, and the hardware was considerably different than this, we will say. At one time I bought it and it didn't have a horizontal slot. I am quite sure of that. It was a jamb type, but considerably different.

Q. Quite different from this figure 4?

A. Yes.

Q. Did you prepare this Exhibit V, by the way, this photostat, that is the big photostat?

A. No, I didn't prepare it personally. It was made up from pictures that I had seen.

Q. Do you know who did prepare it?

A. I can't answer that, no.

Q. It was just given to you to look at?

A. I was showed the pictures, the pictures it was taken from, as I think I was asked.

Q. Now, referring again to this photostat, Exhibit V, I wasn't entirely clear on all these 40 parts, or the significance of that. Did I understand you correctly that you count the holes as parts, that is, you add the hole to get 40?

A. No. Rivets, bolts, nuts, washers, and so forth. That was approximately what it was, and it wasn't



(Testimony of S. K. Coulter.)

definitely taken apart, but it was approximate, as I testified.

Q. There was some definite, tangible piece of material? [355] A. A definite piece, yes.

Q. And you followed the same system with these others, I believe? A. Yes.

Q. And you count washers as a separate part?

A. Washers, that's right.

Q. By the way, was that 40 parts on just one-half of a set? A. One-half, that's right.

Q. A half of a set? A. Yes.

Q. And it was the same in the others?

A. Yes.

Q. If you will refer to that claim outline, Exhibit 4, which you were looking at a while ago—

A. Yes, sir.

Q. —I believe in discussing the elements D and E, you pointed out that you did not find in any of these other types shown in this Exhibit V, the photostat, a link of adjustable length, that you mentioned that the Sturdee set, all of the sets were capable of slight vertical adjustment of the door?

A. Yes, sir.

Q. So that it boils down to this, that Tavart does [356] it one way and Winchel does it another and Sturdee does it another?

A. Well—yes, sir, that's right.

Q. They are all different?

A. That's right, they are all different.

Q. Different approaches to the same problem?

A. That's right.

(Testimony of S. K. Coulter.)

Q. In discussing that Econo-Jamb instruction sheet, I think you pointed out that the Tavart was a little simpler, perhaps, because it had a single bolt for connecting the cantilever arm to the bracket, and for effecting the adjustment, whereas Sturdee had the two bolts. A. That's right.

Q. For checking that adjustment?

A. That's right.

Q. That is, the change of his arm length?

A. That's right.

Q. By the same token, I imagine the Sturdee is a little sturdier, isn't it, by reason of having two bolts instead of one?

A. That would be a natural supposition, yes.

Q. By overlapping those arms, those cantilever arm sections, you get increased stiffness in the center portion, don't you? That is, you have several inches of overlap of those two ends that are bolted together by a couple of bolts, [357] so that gives you a little more stiffness in the center section?

A. Yes, it would. It would be a little stiffer.

Q. These various patents you refer to, all of those patents which are a part of Exhibit U, that is in the book of patents, U-5, U-9, U-10, U-12, U-14 and U-15, that is, Wolf, Holmes, Peck, Holmes, Violante and Wread, those are the ones you discussed, all of those are pivot type hardware, are they not? A. That's right.

Q. And pivot type hardware as such is considered in the trade to be quite different, is it not, from jamb type hardware?

(Testimony of S. K. Coulter.)

A. Well, yes. It is a different type of hardware. It hangs on the wall. Some types of these have double pivot, which would be the equivalent of jamb type.

Q. In the trade, when you speak of pivot type hardware, you mean a particular class?

A. That's right.

Q. As illustrated by these patents?

A. That's right.

Q. And when you speak of jamb hardware, you have in mind a different type, such as indicated by the exhibits here in court?

A. That's right. That is where they get their name. [358]

Q. Because it fastens onto the jamb?

A. That's right.

Q. In the pivot type hardware of that type, it is fastened to the side wall of the garage, is it not?

A. That's right.

Q. As distinguished from being fastened to the jamb, that is, the door opening frame?

A. I didn't get the last word.

Q. As distinguished from being attached to the jamb of the door?

A. That's right. It is fastened either to the wall, door, post, built out, or something of that kind.

Q. One of the advantages, I believe, of jamb hardware over pivot type is that you don't have to worry about the differences in distance between the jamb opening or door opening, and how far away or how close that side wall is.

(Testimony of S. K. Coulter.)

A. That's right.

Q. All of those pivot type hardware sets illustrated in the patent, and with which you are familiar, have the supporting arms on an angle, do they not, a bias, so to speak?

A. Well, we would say it this way: They are capable of being put on an angle, all of them. Without looking through them, they could be hung perpendicular, but they are capable of going on an angle, put it that way.

Q. I did not mean to lead you into a misstatement. [359]

A. That's all right.

Q. Let's assume this: The side of the wall is always faced back some distance, anywhere from a few inches to a few feet from the jamb?

A. That's right.

Q. Pivot type hardware, because it has to fasten to the wall itself or to a bracket on the wall, must of necessity have the supporting arms angle out to the sides?

A. That's right.

Q. So that they can go up and down like this?

A. Yes.

Q. Whereas a jamb type hardware, being fastened to the jamb, more or less moves in a vertical plane?

A. That's right.

Q. In the pivot style hardware where you have this off-center bias supporting situation, it is essential, of course, that you have those arms adjustable in some way so that you can locate where this pivot point goes so you can take care with one set of a



(Testimony of S. K. Coulter.)

wall six inches from the jamb or a wall that is two feet, is that correct?

A. Well, we wouldn't do it that way.

Q. How would you do it?

A. Because the door wouldn't hang properly by doing that. We would have to bring your wall out to correspond somewhere near the same distance on each side, or you would [360] have nothing but trouble.

Q. You would have to actually build the wall out?

A. That's right, or a post, or something like that.

Q. What tolerance do you have in that type?

A. Six inches is about the most we would vary.

Q. About all you would have available readily?

A. Yes.

Q. You are familiar, I believe, with the types of jamb hardware that were made, at least that were on the market here prior—well, let's say prior to the advent of present-day Tavart type in about 1945, I believe you said. Were you in the business prior to that time? A. I was.

Q. You are familiar, then, with this—well, as a matter of fact, yes, you testified as to Exhibit C-4. Do you have that in front of you, that Coffey? It is the last photo in this Exhibit C. Do you remember that Coffey hardware? A. Yes.

Q. An Easy jamb model? A. Yes.

Q. This photo doesn't show any slot in the jamb bracket? A. That's right. [361]



(Testimony of S. K. Coulter.)

Q. Let's assume for the moment that there is no slot there. If there is no slot there, then that hardware would be typical, would it not, of earlier hardware sold of the same type, that is, hardware without adjustment?

A. It would have had to have been a hardware that definitely—the jamb and the door would have had to be exactly plumb unless there was some adjustment on it.

Q. In other words, unless you had some means for adjustment, you would have to almost tailor make each set of hardware for the door?

A. Or tailor make the doors, one way or the other.

Q. Or tailor make the doors? A. Yes.

Q. In your experience, did you run into any hardware some years ago manufactured like that, where the cantilever arm or link was fastened to the side rail, but there was no means for adjustment?

A. I can't recollect any where they had one solid angle on it. We have been taking most of this off, rather than installing it.

Q. Let's refer just for a moment to that Winchel exhibit we had here a moment ago, G, I believe.

A. Yes.

Q. Where is that little blue Winchel folder? Here it is. [362]

In this Winchel type, let's forget this little tiny slot here at 15, other than that, this is typical, is it not, of several different brands of jamb hardware

(Testimony of S. K. Coulter.)

which were sold along in the early forties, where the cantilever arm or link, 13, was not anchored to the side rail, 11, but it had the separate foot plate or bracket? A. That's right.

Q. And the means for adjusting that type hardware was merely to change the position of this foot plate, 14, on the door, wasn't it?

A. Yes, to plumb it and put it right the first time.

Q. Because once you got it on, then you couldn't make any more adjustment on it?

A. You could take and plug the holes and change them, but it wasn't practical.

Q. You would have to take the screws or bolts out of your little foot bracket, 14, and shove it up and down, and then make some new holes?

A. Yes. We have hardware being built today that is the same way.

Q. Hardware built today that is like that?

A. Yes, sir.

Q. I imagine it is a practical disadvantage, isn't it, to have to try to put a new set of holes fairly close to the old set, if you get one of those out of adjustment when [363] you first put it on?

A. That's right.

Q. In your opinion, then, I gather that this type of hardware where the link is fastened to the angle iron itself, as in the Tavart and in the Sturdee, and the later Winchels, is better than this type shown here that we were just discussing?

A. You are going to get me into a complete riot

(Testimony of S. K. Coulter.)

here if I answer questions like that. We have competitors making one and then the other. I wouldn't make a statement on that at all.

Q. Well, I don't want to put you on the spot. Let's just put it this way, that the jamb type where the cantilever arm is fastened to the side rail is a little quicker and easier to install?

A. Yes, that's right.

Q. And is easier to adjust?

A. That's right.

Mr. Fulwider: I believe that's all, your Honor.

#### Redirect Examination

By Mr. Beehler:

Q. Mr. Coulter, you were asked on cross-examination, I believe, whether or not you knew of any currently manufactured item of jamb type hardware which had an adjustment [364] lever, a lever in two parts which could be extended or contracted, and your answer was no, is that correct, other than the hardware in suit?      A. That's right.

Q. Are you familiar with any currently manufactured type pivot hardware where the lever is adjustable as to length, where it is made in two parts?

A. We use a telescope pivot hardware every day where one pipe fits over the other and is set by set screws.

Q. You declined to express a preference for one type jamb hardware over the other, I notice, but

(Testimony of S. K. Coulter.)

you do install both pivot type, on the one hand, and the jamb type on the other?      A. That's right.

Q. Do you have any preference for the pivot type over the jamb type yourself?

A. I am definitely a pivot man, if that is what you want to know. We still like the pivot.

Mr. Beehler: That's all from Mr. Coulter. [365]

\* \* \*

PAUL HALOPOFF

called as a witness by and on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Beehler:

Q. Will you tell us your business connection, Mr. Halopoff?

A. I am employed with Hally Stamping Company.

The Court: With whom?

The Witness: Hally Stamping Company.

Q. (By Mr. Beehler): That is one of the defendants here?      A. Yes.

Q. Will you tell us, Mr. Halopoff, whether or not you recognize this circular, this instruction sheet, Defendants' Exhibit E for identification?

A. Yes.

Q. State for the record, please, where you got that.



(Testimony of Paul Halopoff.)

A. I purchased a set from Scofield Manufacturing.

Q. By set, you mean a set of hardware? [366]

A. Yes. That was one of the instruction sheets in it.

Q. When did you purchase it?

A. I believe it was the first day of the trial, last——

Q. Last Thursday?

A. Last Thursday, yes.

Q. Where did you purchase it?

A. At their place of business on Otis.

Q. On Otis Street?           A. Yes.

Q. In Los Angeles?

A. I believe it is Southgate.

Q. In Southgate?           A. Yes.

Q. And this instruction sheet, did you state where that was?

A. Yes. That was in the set of hardware. This was in the set of hardware that I purchased.

Q. Was it accessible on the outside of the package?

A. No, it was in with the box of accessories that go with the hardware for installation.

Q. By accessories, you mean bolts and nuts?

A. Bolts and nuts and all the parts necessary to install [367] the hardware.

Q. Did you see any instruction sheet like that on the outside of the package?

A. No, I didn't. It was just a plain package.



The Court: The exhibit is received in evidence as Exhibit E. [368]

\* \* \*

Mr. Beehler: Before putting on the next witness, yesterday we examined Mr. Martin and had him exhibit in court certain of his records, and over last night I did make a recap of portions from his checkbook stubs so that we could avoid putting them in evidence. Rather than take the court's time by reading off the specific items, I have had a recap made of those portions which appear to have some significance. [369] I would be glad to have counsel for the plaintiff compare the recap with the original stubs, if he cares to.

\* \* \*

The Court: It may be received and marked defendants' Exhibit W. [370]

\* \* \*

Mr. Beehler: I also have here from his books certain pages which are tied to the check book stubs. He identifies them as subcontract No. 27, 28, and so on. There are many sheets, so I have had photostats made of only the sheets that are tied to the check book, which I also want to introduce in evidence.

The Court: If there is no objection, they may be introduced as Exhibit X.

\* \* \*

Mr. Beehler: The next exhibit in evidence is pages 22, 23, 24, 25, 26, 27, and 29, and also a photostat of one loose page which is not numbered ex-

pressly, but which is captioned "Earl Murphy, start July 1, regular employee."

The Court: Let's make that Exhibit X-1.

The Clerk: In evidence, your Honor? [371]

### VICTOR M. CARTER

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

\* \* \*

#### Direct Examination

By Mr. Beehler:

Q. Mr. Carter, I show you here Vimcar builders hardware [372] catalog No. 14, reading from the cover page, and refer particularly to page 28. Will you tell us, is that one of your catalogs?

A. Yes, it is.

Q. What was the date of publication of that catalog?

A. Catalog No. 14 was published during November, 1947.

Mr. Beehler: I wish to offer in evidence, and to not burden the record too much, the cover page and page 28 of catalog No. 14.

The Court: It may be received and marked Exhibit Y.

The Clerk: So marked, Defendants' Exhibit Y.

(The document referred to was received in evidence and marked Defendants' Exhibit Y.)

Mr. Fulwider: What is the page?

Mr. Beehler: Page 28.

(Testimony of Victor M. Carter.)

Q. Now, will you refer, Mr. Carter, to page 28 of the catalog, at the middle of the page, where there are items A, B, and C, and having particular reference to item B, where it says, "8" overhead clearance," there appears, "No. T1-8 single door."

I find on a recap of your invoices from Tavart, the number T1-L8. Does that or does that not mean the same item of hardware?

A. Yes, that is the same item. We just dropped the L. [373]

Q. Did the L have any significance to you, or why did you drop the L?

A. It had no significance to us.

Q. That was a Tavart designation then?

A. That's right.

Q. Does that same comment also apply to item C there, No. T1-3, which on the recap is T1-L3?

A. Yes.

Q. And the same is true of item No. T2-3, instead of T2-L3?

A. Yes.

Q. And also with respect to T2-8 instead of T2-L8?

A. Yes, sir.

Q. Those items just referred to were all items of Tavart manufacture purchased by you from Tavart long before your business association with Fowler, is that correct?

A. Yes, sir.

Q. Now, Mr. Carter, there was shown here during the first day of the trial a little table model, Plaintiff's Exhibit 3. Will you, Mr. Carter, tell us what you know about the origin of this table model illustrating a garage door hung on jamb hardware?

(Testimony of Victor M. Carter.)

A. Well, at the time we dealt with the Tavart Company, Mr. Bly supplied us with similar models free of charge with every five or six sets, I don't remember exactly, [374] one with every five or six sets that we purchased.

When we started dealing with Mr. Fowler, he didn't want to supply the models, but he assisted us in obtaining them, so we obtained, with his assistance we had the lumber part of it manufactured by a furniture factory on Avalon Boulevard, I believe in the 6,000 block, and the hardware was made by a small subcontractor on Whiteside, 4041 Whiteside Street. The silk screening on the face of it was done by the Glass Arts Company on 38th Street. The little handle was supplied by us from stock. We paid about either three and a quarter or three and a half for the total assembly, and then we had them packaged in the cartons.

Q. They were all made at your expense?

A. Yes.

Q. All at your expense?

A. Made by us, every part of it, and our own trade-mark was on the face of it, the Olympic mark.

Q. That particular model had been used by you for the sale of jamb type hardware before you made any purchases from the plaintiff here?

A. Oh, yes, much before.

Mr. Beehler: I would like to have marked for identification this circular bearing caption Olympic Jamb Type Overhead Garage Door Hardware.



(Testimony of Victor M. Carter.)

The Court: It may be marked Exhibit Z for identification. [375]

\* \* \*

Q. (By Mr. Beehler): Now, I show you, Mr. Carter, first Exhibit Z-1 for identification. Will you tell us where that originated, if you know?

A. Yes. That was made in our office.

Q. Was that made by persons in your employ or was it furnished by the plaintiff? [376]

A. No. Persons in our employ.

Q. And paid for by you?

A. Paid for by us.

Q. What is the hardware that is illustrated there? A. Jamb type hardware.

Q. Was that your hardware that you sold or hardware that the plaintiff sold?

A. Well, it was to show the jamb type hardware that we sold.

The Court: When was that made, about when?

Mr. Beehler: Well, maybe this will help.

Q. Showing you Defendants' Exhibit Z, will you compare the two pictures and tell us whether or not those are the same pictures?

A. Yes, they are exactly the same pictures, prepared by one of our people in our employ and paid for by us.

Q. And Exhibit Z illustrates what kind of hardware?

A. Olympic jamb style hardware. [377]

\* \* \*



(Testimony of Victor M. Carter.)

Cross-Examination

By Mr. Fulwider:

\* \* \*

Q. Now, what hardware does that cut Z-1 portray? You said it was made to show the hardware you sold. Was that made during the time you were buying hardware from Mr. Fowler or was it made after you stopped buying from Mr. Fowler?

A. As I said, I don't remember the dates, so I couldn't tell you that.

Q. You don't even know whether it was during the Fowler supply time or afterwards?

A. I will check the date and be glad to tell you.

Q. Do you know what hardware the hardware used in making this sketch was?

A. No, I do not.

Q. So you don't know what hardware these exhibits Z and Z-1 illustrate?

A. Oh, yes, that is Olympic hardware, jamb type hardware.

Q. Olympic jamb type hardware, but you don't know what hardware is shown here? I will put it this way. You don't know whether this hardware shown here was bought from [379] Mr. Fowler or whether it was bought from Mr. Halopoff, do you?

A. I wouldn't remember. I would have to check the date of publication.

Q. As a matter of fact, I call your attention to the shape of this jamb bracket right at the point where the master arm fastens on, and ask you if

(Testimony of Victor M. Carter.)

it is not a fact that that is a correct portrayal of the hardware sold to you by Mr. Fowler, and also sold by him as Econo-Jamb?

A. Whether this is what?

Q. Doesn't that illustrate Sturdee hardware?

A. Well, I wouldn't say for sure.

Q. In other words, you don't know for sure?

A. Not in a technical way.

\* \* \*

Mr. Beehler: May I suggest that the witness has said it is Olympic hardware. I offer both exhibits in evidence as an illustration of the Olympic hardware. [380]

\* \* \*

Q. Now, with that foundation, will you compare this portrayal of a jamb bracket here in your Exhibit Z with this jamb bracket here? Let me turn this around.

A. May I see the other jamb bracket?

Q. Yes. I will put this one at the same angle, and this one the same. Now, will you compare the two sets of hardware, Exhibits 2 and 5, with the illustration of the jamb bracket shown in your Exhibit Z, and tell me in your opinion which of these two sets that cut illustrates?

A. Well, actually, it looks more like this one, but it seems to be a little rounded, whereas this one seems to be more straight.

Q. It is a little rounded like this, referring to Exhibit 2?

A. But this one seems to be projected up.

(Testimony of Victor M. Carter.)

Q. By "this one," you mean the picture——

A. The picture shown here.

Q. That this seems to be higher at the pivot point. [382]

\* \* \*

Q. Having reference, again, Mr. Carter, to Exhibits Z and Z-1, the printed SM 213 flier and wash drawing, will you tell us as near as you can when those were prepared?

A. It was sometime during '49.

Q. And you found that out from your office over the noon hour?      A. Yes, I did.

Mr. Beehler: I offer them in evidence as Defendants' Exhibits respectively Z and Z-1.

The Court: They may be received and marked Exhibits Z [386] and Z-1.

\* \* \*

Mr. Beehler: I wish also to offer in evidence the photostat which we have talked from in Mr. Coulter's testimony, Exhibit V for identification, as Exhibit V.

The Court: What was that, Exhibit B?

Mr. Beehler: Exhibit V.

The Court: It may be received.

\* \* \*

### Cross-Examination

By Mr. Fulwider:

Q. Mr. Carter, you don't know when in 1949 Exhibits Z and Z-1 were prepared?

(Testimony of Victor M. Carter.)

A. No, I do not. As a matter of fact, our man is trying to pin down the date closer right now. I called him, [387] thinking that he might have it, but he does not have it. It was in '49.

Q. Can you tell us when Exhibit Z-1 was first distributed to the trade?

A. That is what we are trying to get the information. It was sometime in '49.

\* \* \*

### CARVEL MOORE

recalled as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified, in rebuttal, as follows:

#### Direct Examination

By Mr. Fulwider:

Q. Mr. Moore, I show you here a blueprint, Defendants' Exhibit P, and ask you to examine that and can you tell us or can you identify that drawing and tell me anything about it?

A. Yes, I made the drawing after conference with Mr. Fowler. [388]

\* \* \*

Q. Looking at the drawing, I call your attention to the fact that the date is 9-1-48, and the number is 491. Can you tell me whether or not that drawing was made on that date that it bears, and whether or not the number 491 has anything to do with it?



(Testimony of Carvel Moore.)

A. Yes. It has been pointed out that the date is in error on it. [389]

\* \* \*

Q. That Exhibit 24, those are invoices issued by your [390] office, I take it? A. Yes, sir.

Q. And that particular invoice you are reading, is that an invoice sent by you to Mr. Fowler?

A. Yes.

Q. What is the second item on that invoice?

A. Photographs of Econo-jamb Hardware for use by Vimcar Company.

Q. Did that have any relation to the photographs you previously mentioned? A. Yes.

Q. Are those the photographs that you testified the other day that you made for delivery, and I believe you did send a set to Vimcar?

A. That is correct.

Mr. Beehler: May we have the exhibit numbers of those photographs, if they are in evidence?

Mr. Fulwider: That is 22, I believe. Yes, 22-A, -B and -C. I had better show these to the witness.

Q. (By Mr. Fulwider): Exhibits 22-A, -B and -C are the photographs which you testified about the other day. Are those the photographs or some of them, at least, referred to in this invoice 4926?

A. That's correct.

The Court: May I ask this witness a [391] question?

Mr. Fulwider: Yes, your Honor.

The Court: This date on this blueprint, I suppose that is the date it was made?

(Testimony of Carvel Moore.)

The Witness: No. "49" indicates the year 1949.

The Court: All right. You have got it dated 9-1-48. I suppose that 9-1 is the correct date?

The Witness: Well, the date seems to be in error, your Honor. Why it is, I don't know.

The Court: Do you mean to say the date—let's forget the year '48 or '49, you have got "9-1," doesn't that indicate the date that the drawing was made?

The Witness: It could have indicated the date that it was completed or a change made on it. Maybe the date hadn't been entered at the time—

The Court: The reason I want to know is because your invoice is in August, before the date of this drawing. Why would you send an invoice for the drawing before it was made, if you did?

The Witness: We may not have sent the drawing prior to the time that it was invoiced. Sometimes these drawings go on a discussion stage. I may have invoiced Mr. Fowler at the end of August, but the drawing could have been printed up the first part of September.

The Court: How long have you been engaged in this business? [392]

The Witness: Approximately 11 years.

The Court: Have you ever made a mistake on the date before?

The Witness: I imagine I have made mistakes.

The Court: Draftsmen don't usually make mistakes, do they?

The Witness: Yes, there are quite a few mis-

(Testimony of Carvel Moore.)

takes made, and that is why checkers are used, to catch dates, dimensional errors.

The Court: Was this checked?

The Witness: No, there is no check on it. It was strictly a sales approach to the thing.

The Court: Then your testimony is that all the date is wrong, 9-1-48 is entirely wrong?

The Witness: Yes.

The Court: Your testimony is that you made it sometime in '49?

The Witness: Yes, sir.

The Court: And you have no way of telling me when it was made?

The Witness: No way other than by proof of the invoice.

The Court: I assume that was made prior to the invoice?

The Witness: That is correct.

The Court: How much prior?

The Witness: I would say normally during the month prior [393] to the invoicing.

\* \* \*

The Court: Do you have any independent recollection when [394] this drawing was delivered?

The Witness: No, sir. As I recall, the vellum was given to Mr. Fowler. I had no license to contact Vimcar.

The Court: You didn't deliver it by mail?

The Witness: No.

The Court: You delivered it personally?

The Witness: Personally.

(Testimony of Carvel Moore.)

The Court: You don't know when that was?

The Witness: No, sir.

The Court: Without referring to your records?

The Witness: I would have no record of the delivery.

The Court: Do you have any record showing when it was ordered?

The Witness: No. Most of this is ordered in discussion with a client. We have a conversation or discussion possibly once or twice a week, either over the phone or in person.

The Court: You don't have an order book?

The Witness: No. I mean Mr. Fowler has not issued purchase orders to me on most of this type of work. Some of it is done on a retainer basis.

The Court: Where do you get your information as to what to draw, what to prepare?

The Witness: Off of a sample set of hardware. I take it home or to the office.

Mr. Beehler: We can't hear the witness. [395]

The Witness: I take it off of the sample set of hardware.

The Court: Do you remember who gave you the sample?

The Witness: Mr. Fowler. When he gave it to me?

The Court: Now, do you remember when he gave it to you?

The Witness: No, sir, I wouldn't have a date.

\* \* \*

Q. (By Mr. Fulwider): You did the art work,



(Testimony of Carvel Moore.)

I believe you said, on Mr. Fowler's Econo-jamb and Deluxe instruction sheets?

A. That is correct.

Q. Will you refer to some of the other invoices in this group, Exhibit 24, and point out the invoices there, if any, that have to do with that art work for those instruction sheets?

A. Invoice 496 on February 22, 1949, was for the Revolutionary Econo-jamb. That was a four-page folder advertising piece.

Q. Do you know whether or not that was the first folder of that type that you made on the Econo-jamb?

A. Yes. Invoice No. 495 was the invoice for the original art work for the Econo-jamb instruction sheet.

Q. That is the instruction sheet that you testified about here the other day, that is, Plaintiff's Exhibit 10? Is that the one that you think that invoice refers to?      A. Yes. [396]

Q. Is there one about Deluxe instruction sheets?

A. Invoice No. 498, March 14, 1949.

Q. Is there any substantial difference between the Deluxe and the Econo-jamb that you know of?

A. The substantial difference is in the shape of the jamb bracket, the power arm is a channel instead of a flat bar.

Q. They each have a two-piece cantilever arm?

A. Yes.

Q. Are there other invoices that have any significance?      A. No.

(Testimony of Carvel Moore.)

Q. I believe you testified the other day that you have been doing advertising work for Mr. Fowler for several years. Did you do any art work on a previous set of hardware of his called Lo-Head?

A. Yes, a small folder was prepared for Lo-Head.

Mr. Fulwider: May this be marked Exhibit 25?

The Clerk: Exhibit 25 for identification.

(The document referred to was marked Plaintiff's Exhibit 25, for identification.)

Q. (By Mr. Fulwider): I call your attention to Exhibit 25, which I might state for the record was Exhibit 5 in Mr. Fowler's deposition, which is in evidence as a defendants' exhibit. Did you prepare the art work on this Exhibit 25?

A. Yes. [397]

Q. Will you tell me whether or not this illustration on page 1 is a photograph or a line drawing?

A. It is a line drawing.

Q. And did you make it?           A. Yes.

Q. And did you make these drawings on the inside?           A. Yes.

Q. Do you have any recollection as to about when that was made, Exhibit 25?

A. I have no accurate date for recalling that, no.

Mr. Fulwider: We will offer that in evidence, your Honor, merely to show an earlier style of hardware that was manufactured by Mr. Fowler, and to complete the deposition.

The Court: It may be received as Exhibit 25.

(Testimony of Carvel Moore.)

The Clerk: So marked.

(The document referred to was marked Plaintiff's Exhibit 25, and was received in evidence.)

The Court: May I ask this witness another question while you are debating about your next question?

Mr. Fulwider: Yes, your Honor.

The Court: Those figures on the last exhibit before you, that is, the little man, did you create that or did you get that from some previous artist?

The Witness: No; I created it.

The Court: That is your creation? [398]

The Witness: Yes, sir.

The Court: Referring back again to this blueprint, Exhibit P, in looking at it I notice some figures 8-18-49, on the bottom of the blueprint; do you know what that is?

The Witness: No, sir.

The Court: Do you know whose handwriting that is?

The Witness: That is not mine.

The Court: That is not in your handwriting?

The Witness: No.

The Court: That doesn't mean anything to you at all?

The Witness: Not to me. [399]

(Testimony of Carvel Moore.)

Cross-Examination

By Mr. Goodman:

Q. Mr. Moore, did you make the original of the drawing which is Defendants' Exhibit P in evidence, on white paper?

A. Yes, on a drawing vellum.

Q. Where is that document now?

A. I believe it is in Mr. Fowler's possession.

Q. When did you see it last?

A. Approximately a month ago.

Q. Where did you see it last?

A. At his office.

Mr. Goodman: Has counsel got the white of this drawing?

Mr. Fulwider: No. I assumed last night when I finally got hold of Mr. Moore on the telephone that he had the vellum, and I just said, "Bring it." And he tells me he doesn't have it, and he thinks he brought it over to Fowler's about a month ago. Mr. Fowler says that he thinks that he has it.

I wonder if we could send over to get it. Is it sufficiently important that you want the vellum?

Mr. Goodman: I think we should have it here.

The Court: What is the vellum going to show that this blueprint doesn't show?

Mr. Goodman: Let me develop my cross-examination further. Maybe we can dispense with it.

Q. (By Mr. Goodman): Is this blueprint an exact copy of [400] the original white?

A. I believe it is, without checking the two together.



(Testimony of Carvel Moore.)

Q. Is everything on that original white paper in your handwriting?      A. Yes.

Q. And, therefore, I take it from your answer that everything on this blueprint is in your handwriting, being a counterpart thereof?

A. I would believe so, without cross-checking the two together.

The Court: I would like to make one correction. These figures 8-18-49 he has testified were not in his handwriting.

Mr. Goodman: I will exclude that. The last answer would exclude the figures in the lower right-hand portion of the document "8-18-49"?

The Witness: That's correct.

Q. (By Mr. Goodman): Now, the legends in the lower right-hand corner, were they all put on that exhibit at the same time?

A. As far as I know they were.

Q. And where did you get the information with which to make the original drawing?

A. From the sample set of hardware picked up from the client.

Q. Was that a full and complete set of hardware? [401]      A. Yes.

Q. Was it comparable to what you see here in the courtroom marked Plaintiff's Exhibit 2 in evidence?      A. Yes.

Q. Where did you first see that set of hardware?

A. Sturdee Steel Products.

Q. At the time that it was handed to you, were you given any dimensions?

(Testimony of Carvel Moore.)

A. No. I took the physical dimensions off of it.

Q. You worked out all of the dimensions which appear on this drawing? A. That's correct.

Q. How long did it take you?

A. About 12 hours.

Q. About 12 hours. At the end of that period did you have a complete drawing?

A. In its present state, yes.

Q. Including all of the detail which you have here? A. Yes.

Q. And all the measurements?

A. That is correct.

Q. When were the blueprints made?

A. I have no idea. I didn't have the blueprints made.

Q. You don't know who made them?

A. No, I don't. [402]

Q. On the original that you prepared, was this legend on the original at the time it left your possession, in the lower right-hand corner, "Details of 'Olympic' Jamb Type Hardware"?

A. That is correct.

Q. Who told you to put that legend on the original?

A. That was a result of a discussion with Mr. Fowler regarding the sales drawing. [403]

\* \* \*

Q. Where did you get your information to prepare the instructions?

A. From the sample set of hardware. There are no dimensions shown on the instruction sheet as to

(Testimony of Carvel Moore.)

the physical parts of the hardware. It is strictly a pictorial representation.

Q. I ask you to examine the instruction sheet—do you have it before you?      A. Yes.

Q. Does it not have certain dimensions?

A. It has a dimension for establishing it on the jamb, but it does not dimension the hardware itself.

Q. Where did you get those dimensions?

A. From Mr. Fowler.

Q. You didn't work those out from the item itself?      A. No.

Q. Is it the usual custom for a draftsman to prepare instructions before he prepares a blueprint, or vice versa?

A. In this instance the information being furnished by the client, and I assume he received his data from his door hangers, it was strictly in order to do it that way.

Q. When you finished the original drawing, you gave it to Mr. Fowler and you have never seen it since, I take it, is that right?

A. That is correct. [404]

Q. I believe in answer to the court's inquiry you don't recall when you delivered it to him?

A. No.

Q. Do you know what happened to the hardware that you were using when you prepared the blueprints?

A. I believe I returned it to Mr. Fowler. I had no use for it.

Q. Was it done at your place of business?

A. Yes.

(Testimony of Carvel Moore.)

Q. What is the name of your business?

A. H. Carvel Moore, Industrial Design.

Q. Does your name appear on your invoices?

A. Yes, and the address.

Q. When did you first find out that you had made a mistake in the date, on this drawing?

A. Approximately a month ago.

Q. And who called it to your attention, if anyone?

A. Mr. Smyth.

Q. Where were you at the time your attention was directed to this date?

A. I believe it was over the telephone with Mr. Smyth. [405]

\* \* \*

The Court: May I ask a question?

I understand now that you mark these invoices 1, 2, 3, 4, 5, irrespective of the client?

The Witness: That's correct.

The Court: Evidently you marked the first one "1." and then go on down through the rest of the year, is that correct?

The Witness: Yes.

The Court: Do you have any invoices before August in 1949? You mark this "491"; I assume from your testimony this is the first drawing that you made during the year.

The Witness: For Sturdee Steel, sir; not for other clients. The only thing that would differentiate between 491 on several drawings would be the title block in the lower right-hand corner.



(Testimony of Carvel Moore.)

The Court: I thought you just got through testifying regardless of the client you numbered your drawings beginning with No. 1, and on through the year, and then the next year you would start "50," begin with 1 in January and go on through to the end of the year. That is my understanding. Did I get the wrong impression?

The Witness: Maybe I can clarify it a little bit. If there are three or four clients involved, and they are all asking for an orthographic type of drawing, I may start out with 491 for each one of those. In other words, each of the four clients could have a drawing 491. The second drawing [407] that would be prepared for them during the year, for any one of them, would be 492, for each client.

The Court: You numbered these according to clients, then? I thought you just got through testifying that you didn't; that you numbered them irrespective of who they were for.

The Witness: No, sir. The invoice is numbered in consecutive order irrespective of client. The drawing, though, would go in consecutive order for each client. That is, 491, -2, -3, -4, and so forth, for each client.

The Court: Then you might have a number of clients with 491? [408]

\* \* \*

Q. (By Mr. Goodman): I take it that you have no invoices at all in your records now—not particularly here in court—showing anything that you billed for in the year '48?

(Testimony of Carvel Moore.)

A. I wouldn't verify that. However, I would be glad to check.

Q. Is there anything in your records by which you could justify the error here, anything that would give it to you in writing by Mr. Fowler?

A. No, sir.

Q. Can you explain why the error would have been in the month, as well as in the year?

A. No, I can't. [410]

\* \* \*

Q. (By Mr. Goodman): Did you do the art work on Exhibit 25? A. Yes.

Q. I believe you testified that you didn't know when you did that, is that correct?

A. That is correct.

Q. Was it prior or after February, 1949?

A. It would be prior to '49, February '49.

Q. Then you did art work for Mr. Fowler in 1948? A. Yes, I believe I did.

Q. Do you remember testifying here in the early part of last week that you had never done any work for Mr. Fowler of any kind prior to February, 1949?

Mr. Fulwider: I don't think he so testified.

Mr. Goodman: Yes, he did. I will have the record written up that his testimony was that he did no work prior to February, 1949.

The Witness: May I make a statement?

The Court: You can answer, and then explain your answer.

(Testimony of Carvel Moore.)

Q. (By Mr. Goodman): You can explain your answer.

A. I believe the original testimony on that was that I had done work for Mr. Fowler for five years. Now, the other question Mr. Beehler asked me was had I done any photographs prior to this Econo-Jamb, and my answer was no.

Q. Then your explanation is now that you were limiting [411] your answer to photographs?

A. The second part of the answer, yes. But art work had been done for five years.

Q. For five years? A. That is correct.

Q. Did you retain a copy of the drawings in your records and files? A. Of this blueprint?

Q. Yes. A. No, I have no copy of it.

Q. Of any kind? A. No.

Q. Do you recall now that you delivered this blueprint in person to Mr. Fowler?

A. The vellum was delivered in person. The original engineering drawing was delivered; not the blueprint.

Q. And when did you first see this blueprint?

A. The first print I saw was about a month ago when this was called to our attention. I didn't see a blueprint; it was a different kind of print. [412]

\* \* \*

Q. By the way, you signed the original drawings with your name "H. C. Moore"?

A. That's right. [414]

\* \* \*

JOHN K. McFADDEN

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. I call your attention, Mr. McFadden, to this Fowler patent Exhibit O, which shows the hardware or shows hardware, which has a cantilever arm 15, and it shows in this drawing some slots and bolts, then it shows an extra little arm 17, I believe. When you were testifying yesterday with respect to that drawing and with respect to the Lo-Head—I believe it was Lo-Head—hardware that was made at that time, there is some confusion in the testimony as to whether or not that hardware that was sold in 1946, while you were working for Mr. Fowler, had the cantilever arm 15 made in two pieces as it is shown here in the drawing. Would you clarify that and tell us what your viewpoint—I mean what the facts are as you understand them? [415]

A. The hardware that was made and sold, this arm was not in two pieces (indicating).

Q. By "this arm" you mean the arm 15, the one colored red here?

A. Yes.

Q. You say that was not made in two pieces?

A. It was not made in two pieces.

Q. Otherwise were there sets sold in 1946 that appear to you to be substantially identical with this drawing Exhibit O?



(Testimony of John K. McFadden.)

A. This arm was changed after it was manufactured. This was the original arm, but it was changed into a bent position.

Q. By "this arm" you mean the short arm 14?

A. Yes. It was later bent.

Q. That was later bent to form what we called the other day the boomerang type of arm?

A. Yes.

Q. We had a photo that you identified?

A. Yes.

Q. While you were working there with Mr. Fowler, did you see or do you recall whether you saw in the shop for experimental purposes, or otherwise, an arm substantially like this one, in other words, a two-piece arm?

A. We had it for experimental purposes. [416]

Q. But so far as you know, none of those were sold? A. None of them were sold.

Mr. Fulwider: That is all, your Honor. Wait just a minute. I would like to ask one more question, perhaps.

Q. (By Mr. Fulwider): Did you do anything over the—when was it you testified last. Was it yesterday or last week? It was Friday that you were on the stand? A. I believe so.

Q. Since your testimony, whenever it was, have you done anything or made any investigation to verify your testimony today, or to make you any more certain today than you were the other day?

A. I have.

Q. And would you tell the court what that was

(Testimony of John K. McFadden.)

and why you are just now testifying today as you are?

A. I knew where one of the first originals was installed and I went and checked it. The arm was in one piece. Then I went and checked a set that was installed later, and it was in one piece. So I was definitely wrong if I indicated that it was ever in two pieces.

Q. That is, when you say "it was ever in two pieces," you mean the hardware Fowler sold in '46 and '47, that you talked about the other day?

A. That is correct.

Mr. Fulwider: I think that covers it, your Honor. Your [417] witness, Mr. Beehler.

### Cross-Examination

By Mr. Beehler:

Q. Mr. McFadden, to whom have you talked since you testified here on behalf of the defendant?

Mr. Fulwider: I will stipulate he talked with me out in the hall.

Mr. Beehler: I am asking the witness, if you don't mind.

The Witness: I talked with the man there, speaking.

Q. (By Mr. Beehler): To whom all did you talk as among the people here in the court room now?

A. I talked to several.

Q. Will you name them, please?

A. Mr. Varley, Roscoe Fowler.

Q. Anyone else?

(Testimony of John K. McFadden.)

A. Several of the gentlemen there that I don't recall their names. I don't know their names.

Q. Did you talk to Mr. Smyth?

A. If he would stand up, I could tell. Because I don't know him by name.

(A man stood up.)

The Witness: Yes, I said a few words to him.

Q. (By Mr. Beehler): You mentioned the fact that you had looked at two pieces of the Lo-Head hardware which had been [418] installed some years ago, you say? A. Yes, sir.

Q. Did you look at any more than those two?

A. No.

Q. Where was the first of those two pieces located? A. I have the address here.

Q. Will you read it into the record, please?

A. The man's name is Lange. L-a-n-g-e is the way I would spell it.

Q. And his first name?

A. I can't tell you.

Q. Clarence? A. Clarence.

Q. What is his address?

A. 1042-66th Street, Inglewood.

Q. You know Mr. Lange is an employee of Matlin, do you not?

A. I know he has worked for him at different times.

Q. What was the name and address of the other place that you inspected?

A. Well, when I was there I didn't look at the

(Testimony of John K. McFadden.)

number, to tell you the truth. I can tell you the approximate location.

Q. May I ask who took you there?

A. I went there by myself. [419]

Q. I beg your pardon?

A. I went there by myself.

Q. What was the location?

A. It is on Figueroa Street a block and a half north of Slauson, on the west side of the street. It is Al's Trim Shop, I believe is the name of the place. I think it is Al's Trim Shop, as I remember it.

Q. What prompted you to go to that particular place?

A. My boy remembered there was a set installed there.

Q. Your boy, you say?           A. Yes.

Q. What is his name?

A. The same as mine.

Q. Was he employed by Mr. Fowler at the time that set was installed?           A. No.

Q. How did he know that the set was installed there?

A. He was working with the door hanger.

Q. With who?

A. Some door hanger at the time the set was installed.

Q. Yes? How did he happen to know that that set was installed?

A. Well, he was working with the door hanger.

Q. You mean the door hanger that hung that set?



(Testimony of John K. McFadden.)

A. Yes; that is as I understood it. [420]

Q. Is that what he told you?

A. That is what he told me.

Q. It wasn't Mr. Fowler that told you to go and visit that particular locality?

A. No, it wasn't Mr. Fowler; no, it was not.

Q. Have you ever been charged with infringement of the patent in suit owned by Mr. Fowler?

A. No.

Q. Have you ever been threatened with infringement? Have you ever been told that you were an infringer? A. No.

Q. Have you ever been threatened with infringement of the Smyth patent, which is owned by the Tavart Company? A. No.

Q. I would like to read from your direct examination, Mr. McFadden. It is on page 6 of this transcript which has been handed to us by the clerk.

That is the wrong page. Refer, please, to page 17, the very last question:

“The Court: I want to refer you to Exhibit O and call your attention to the fact that the bars No. 15 and No. 12 seem to be in two pieces, bolted in the middle.

“The Witness: This is bolted in the middle.

“The Court: That is, 15 was bolted in the [420] middle.

“The Witness: Yes, and there was two sets of holes there, one adjustment for a 7-foot door and one for an 8-foot door, but that was all.

(Testimony of John K. McFadden.)

“The Court: How about 12?”

“The Witness: This one had two holes in it, one for the 7 and one for the 8.

“The Court: When you went to work for Mr. Fowler, was the structure in that kind of condition, that is, two bars here and two pieces, or is that something that developed while you worked there?”

“The Witness: That is something that was there.

“The Court: Already there?”

“The Witness: To make the adjustment for the 7 and 8-foot doors.

“The Court: Do you know whether or not that structure was ever made and sold?”

“The Witness: Yes, it was made and sold.

“The Court: You are sure of that, are you?”

“The Witness: Yes, sir.

“The Court: On the market?”

“The Witness: Yes, sir.

“The Court: It was not for experimental purposes only?”

“The Witness: This set was made and [422] sold.

“The Court: In 1947?”

“The Witness: Yes, sir.”

The Court: Now, you have read this testimony. Do you want to ask him a question about it, or have you just read it to refresh his recollection?

Mr. Beehler: I have a little bit more here.

Q. (By Mr. Beehler): With respect to that answer, Mr. McFadden, when you made that statement that was a correct statement, was it not?

(Testimony of John K. McFadden.)

A. No, that was not the correct statement. I found out afterwards that it was not correct, and I wanted to correct it.

Q. And that is after you talked with Mr. Fowler and Mr. Varley?           A. No, sir.

Q. Did you check that before you talked with them?

A. Well, I talked to them the first day that I was here. But I didn't talk to them anything about checking this.

Q. You were called here as a witness under subpoena for the defendant, were you not?

A. I was.

Q. You didn't talk to counsel for the defendant and tell them that you had made a mistake, before your testimony here this afternoon, did you?

A. No. [423]

Mr. Beehler: No further questions.

Mr. Fulwider: I might say to the court that I told Mr. Beehler at the close of the proceedings last night that I talked to Mr. McFadden and he said he made a mistake, and we were going to call him today, so Mr. Beehler had all the opportunity he wanted to talk to Mr. McFadden.

The Court: Evidently he knew this was coming up, because he checked the testimony and had it in mind. I don't think he was caught by surprise at all. I think he had been plenty warned.

Mr. Fulwider: I might ask one question. I think you covered this.

(Testimony of John K. McFadden.)

Redirect Examination

By Mr. Fulwider:

Q. Neither I, nor Mr. Fowler, nor anyone on our side of the case, asked you to go out over the week end and check, did we?

A. No. I went on my own to check.

Q. On your own hook?           A. That's it.

Mr. Fulwider: That is all, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Beehler: May I suggest one thing more? We, as [424] counsel for the defendants, did not have this testimony written up. It was handed to us this morning in court.

Mr. Fulwider: I asked the reporter to write it up, because I was so thoroughly confused. I asked him to get it to us as soon as he could so we knew exactly what he did testify to.

\* \* \*

S. G. VARLEY

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. I believe you testified before that you are the manager of Tavart Company?           A. I am.



(Testimony of S. G. Varley.)

Q. Is that Tavart Company that has manufactured Tavart hardware that we have been talking about in this trial?

A. It is the same company, yes, sir. [425]

Q. What are your duties as manager of Tavart, just generally?

A. They are just general; I do a little of everything that is indicated by managing the company.

Q. Do you have to do with the manufacturing as well as the business end of it?

A. I don't actually run the shop myself, but I watch it pretty closely.

Q. I believe you stated to us the other day that you had started Tavart in 1945. Prior to that date were you acquainted with or interested in overhead hardware?

A. I originally started in 1939, in the overhead door business.

Q. What branch of the business was it that you were engaged in in 1939?

A. That was building and installing doors, door hanger work as they call it now.

Q. In the course of that business did you have occasion to buy hardware from others?

A. I bought all my hardware. I didn't manufacture any.

Q. I wonder if you would tell us what general types of hardware were available on the market at that time?

A. Well, primarily there was a pivot type I used as manufactured by Crawford, who later changed

(Testimony of S. G. Varley.)

to Osborne. And [426] sometime later I started using hardware by Mr. Smith, which is the fore-runner of Tavart.

Q. That is the Mr. Smith who is the patentee of this Smith patent that Tavart owns?

A. Yes.

Q. What is his first name? A. Norman.

Q. That was a jamb type hardware, was it not?

A. Yes, sir.

Q. Were you acquainted along in that period of '39 to '41 with any other type of jamb hardware?

A. Well, along in I believe it was '41 there was another one came out. Towers, I believe was the name of it.

Q. Referring to Exhibit C-4, I call your attention to this particular picture of the Easy Jamb model of Coffey Hardware. Now, we can't see any slot there, so let's assume there is one. Other than that, or with that one assumption, does that illustrate the Smith type hardware that you just mentioned?

A. This particular set is a duplicate of the hardware we made in 1945.

Q. The particular one shown in that photo that has a vertical slot, although we can't see it?

A. Yes, it has one. [427]

Q. If it didn't have the slot in it, would that be similar to that early Smith that was made in '42?

A. Yes, the early Smith was the same except the cast iron bracket and all riveted together in one piece.

Mr. Beehler: I object to this line of testimony.

(Testimony of S. G. Varley.)

That is asking for a conjecture of this witness who has said he doesn't know what that was. He is just reading from the Coffey description.

The Witness: I do happen to know.

The Court: You do what?

The Witness: I happen to know what it was.

Mr. Beehler: I couldn't hear the answer.

The Witness: I happen to know what that is. I am not conjecturing.

Mr. Beehler: I still raise the objection. This is merely an illustrative drawing.

The Court: Overruled.

Q. (By Mr. Fulwider): I will ask you what this model is that I have here. Can you explain this hatrack that I have here?

A. It is just a means of mounting hardware and demonstrating it, showing it to people that don't understand it.

Q. Now, the particular hardware on here is a piece of your Tavart hardware, isn't it?

A. That is our current model, yes. [428]

Q. This early Smith, which was the forerunner, shall we say, of Tavart, which is illustrated by the Coffey photo,—would you just step down, perhaps, and using this as a prop, explain to the court or point out to the court how that original Smith was hooked up?

A. The original Smith at this point ran down farther. There is no basic difference in the hardware at all from 1945, except the length of this, it gives a slight difference to the door, but as far as

(Testimony of S. G. Varley.)

the hardware itself is concerned, this can run on down to this point approximately where it was.

Q. That is, the link or cantilever arm ran clear on down and anchored to the bottom of the side rail, instead of having this foot bracket, is that correct?

A. This is only to keep it from projecting outside the garage.

Q. You mentioned the Towers. I call your attention to Exhibit G, an early Winchel type. Will you tell us whether or not that is similar except for the little horizontal slot there at 15, with the Towers type that you mentioned?

A. Yes, this Winchel or Towers is the same. This point was moved down about 18 inches, and this angle was only two or three feet long, and there was a very short bracket.

Q. When you said "this point," you mean the point—

A. This point right here was extended right on down.

Q. The lower pivot point? [429]

A. And wasn't fastened to the rest of the hardware except by this arm.

Q. The link was fastened as shown there directly to the door, rather than the side?

A. Yes. Towers was very similar, except for the cast iron bracket.

Q. As to either of those two types that you just discussed, which we might call the early Smith type and the Towers type, or early Winchel type, in



(Testimony of S. G. Varley.)

either of those can you adjust the vertical position of the door once it has been installed?

A. Do you mean the 1939 model of Smith?

Q. That's right.

A. All these points were riveted solid. There was no adjustment at all. The back of the door had to be flush with the back of the jamb, or else we had to block out the bracket or wedge it out. We did everything trying to make it work. Due to the jambs and doors being not always straight.

Q. Why is this vertical adjustment that has been discussed here advantageous?

A. Well, it is due mainly to doors and jambs not being straight, or in a bind, and after the door is installed, quite often they will spring out at the bottom or in at the top several inches, sometimes more, sometimes less, and without this adjustment the hardware has to be taken off and rehung. [430] In the Winchel type you only had to take off about half of it, or the Towers type——

Q. You had better speak up a little bit.

A. With our adjustment you could adjust that without taking the hardware off.

Q. I was going to ask you if you would point out briefly, using this prop that we have here, how the Tavart hardware obtains adjustability of the arm here?

A. We move the center of this arm here, or this end, moving the circle about a point, we move the center of that circle down—up or down, whichever

(Testimony of S. G. Varley.)

is needed, depending on which way the door has to be moved.

Q. You say you move the center of the circle; you mean you move the pivot point on the bracket?

A. This little point may be down at the bottom of the slot or up, or in the middle. It depends where the back of the door is.

Q. That is, the upper pivot point of the cantilever arm?

A. The control arm, we call it.

Q. And if you move this pivot point upwardly in the slot in the bracket, then what happens?

A. Well, if this point is moved up, the door—the whole door will push forward and still maintain a vertical plane, if that is where it is. If you move it down, it will [431] swing this point back and pull the door back.

This adjustment is very critical. It doesn't take, usually, an eighth of an inch, or something, to make it work.

Q. Are you familiar with the Sturdee hardware sold by Mr. Fowler?      A. His current models?

Q. Current models, yes. That is what he calls the Econo-Jamb.      A. Yes.

Q. That is illustrated in the patent in suit here?

A. Yes, I am.

Q. Does the Sturdee hardware have means for adjusting the vertical position of the door?

A. Yes; they have a little different method than we do.

Q. Would you explain how the Sturdee operates?

(Testimony of S. G. Varley.)

A. They change the length of this arm by having it cut in two, and overlapping, I don't know just how they do it, I know they change the link in it, I believe there is a slot in one or both arms.

Q. By "this arm" you mean the cantilever arm?

A. Yes, this control arm (indicating).

Q. That is referring to Exhibit 2, this cantilever or control arm? A. Yes, that's right.

Q. One of which sections has slots and the other has [432] holes?

A. That's right. I say those slots let them change the length of this, which the result of changing the position of the door is the same, the same result as we get.

Q. I believe you said he gets it in a different way? A. That's right.

Q. Are there any other differences there in the **approach to the problem** followed by Tavart and the approach to the problem followed by Sturdee?

A. Our development was primarily in making hardware easy to install, to install any place. It is easy to do and easy to understand, and it does not change the path of the door. There are any number of combinations of these measurements that will make the door go up overhead, but each one gives a different action. We were shooting after a definite path for the top of the door, that is, this overhead clearance, when we developed this particular set, and we didn't want it to change every time the door had to be adjusted.

Q. Is the Sturdee hardware any simpler con-

(Testimony of S. G. Varley.)

struction than yours, would you say, or more complicated, or is there any difference?

A. In being simpler or not, I don't know, it is a matter of opinion. Neither one is very complicated.

Q. Is the Sturdee hardware any more or less likely to [433] get out of adjustment with rough treatment than your hardware, can you tell us?

A. It has two bolts holding two pieces of flat metal together. It would possibly stand a little more stress than ours. However, there is very little stress on this arm. As you can see, it is a little arm and there is very little stress or load on that. There is a possibility that it could be treated in such a way as to make ours slip, where his would be a little harder. We have not considered that important ourselves, however.

Q. As a matter of fact, you can cinch up the Sturdee arm, adjustment arm, adjustable arm, so that it will be almost impossible to have it go out of adjustment?

A. The adjustment itself, yes, could be made rather strong.

Q. By reason of the difference in construction of having two bolts there and doing the adjusting on the arm, whereas with yours you are limited to one bolt, as I understand it?

A. Yes.

Q. Which must be moveable in that slot that is adjustable, is that correct?

A. That's right, yes.



(Testimony of S. G. Varley.)

Q. Are you familiar with the Winchel type hardware that he is currently making? [434]

A. I have seen quite a few types. I think I am. I don't know which is his last.

Q. Showing you here Exhibit J of the defendants, which illustrates the Lo-9 type of Winchel hardware, are you familiar with that?

A. Yes, I have seen it.

Q. I believe he gets gets his adjustment by varying the anchor point—no, varying the position of his foot-plate 26, doesn't he?

A. He has either a slot in the angle or a slot in this little bracket. I don't know which. In the angle, I think. He moves this whole piece up or down.

Q. You can resume your seat, if you wish.

I believe that is all.

### Cross-Examination

By Mr. Beehler:

Q. Mr. Varley, when did you first come out in commercial production with this particular variety of Tavart hardware, where the cantilever arm is the short arm rather than extending clear to the end?

A. It was the first part of '49. In fact, we named it our Forty-niner model for that reason.

Q. The one that came in '49, that had a roller-bearing in it for the first time, did it not? [435]

A. No, sir. We started using a roller-bearing in '48, I think.

Q. When you had the roller bearing you had the shorter cantilever, did you?

(Testimony of S. G. Varley.)

A. No; they didn't come together.

Q. You came out with your short cantilever after Mr. Winchel came out with his short cantilever, is that correct?

A. No. We came out before he did, I am quite sure.

Q. Are you certain?

A. I had never seen a set of his similar to ours until after ours had come out.

Q. When you say you are sure, you mean merely that you didn't see it?      A. Yes.

Q. In your experimenting or designing of a jamb plate, did you ever produce and sell any hardware which had a series of separated holes for the adjustment of the end of the cantilever where it joins the plate?      A. No, sir.

Q. Is this particular variety of Tavart hardware with the short cantilever arm acceptable to the public, do you sell lots of them?

A. It seems to be, yes.

Q. Do you have any idea how many sets you have sold in the last year? [436]

A. Well, yes, I do know.

Q. Will you tell us, please?

A. I don't know exactly. I would say somewhere around fifty to sixty thousand.

Q. Referring to the old Tavart set with the long cantilever arm that came out to the end of the angle-iron, can you give us an idea of how many sets like that you sold?

A. No, I wouldn't guess at that. We ran from

(Testimony of S. G. Varley.)

thirty to sixty thousand sets a year. I would have to do a lot of checking to find out.

Q. They are substantially all still in service, are they not, you haven't changed them for new ones? A. Some of them have worn out.

Q. Other than having worn, they are still in service to the best of your knowledge?

A. As far as I know, yes.

Q. Can you identify your products by catalogue numbers, T1L3?

A. I can by our numbers, yes.

Q. Does T1L3 mean this type of hardware here before us with a short cantilever arm or your type of hardware with a long cantilever arm?

A. It was neither one. It was kind of a hybrid set that we made for a while.

Q. How did it differ from this one here before us? [437]

A. It had extra movements in it. It was more of a complicated mechanism.

Q. Where would the extra movement be?

A. It would be kind of hard for me to describe it. It was designed to get a low overhead clearance.

Q. Did it have a joint——

A. It had a joint in the main arm, and it had an extra control arm.

Q. The control arm, however, was adjustable, was it not? A. Just like this, yes.

Q. Would the T2L8 be comparable to the T1L3?

A. No. T2L8 was similar to our original hardware except for a slightly different arrangement of

(Testimony of S. G. Varley.)

the pivot points to make 8 inches overhead clearance instead of the 14 as required by the older type.

Q. When you say a different arrangement of the pivot points, will you explain how it would be different?

A. This is about the only way I can do it.

(Witness at prop.)

The position of this main pivot point and this pivot point, and the length of this arm and the length of this arm (indicating) can all be varied to any number of combinations, each one makes a different path of the door. We selected one that let the top of the door go not over 8 inches above the [438] opening when the door was open. The original hardware went—took 14 inches.

Q. That, then, would be a variation in the location of the lower slot to the location of the upper hole of jamb plate, is that correct?

A. This is known as linkage, these various pieces. The dimensions of the various linkages were changed to get that.

Q. The changing of those relative positions and adjustments was just a matter of mechanical skill, was it not?

A. Yes, that's right. You can neither try it or lay it out on a drafting board, either way.

Mr. Beehler: No further questions.

Mr. Fulwider: I have one more I would like to ask and it will be a short one.



(Testimony of S. G. Varley.)

### Redirect Examination

By Mr. Fulwider:

Q. Mr. Varley, can you tell me in your opinion the similarities and dissimilarities between pivot type hardware and jamb type? Would you say they are similar?

A. The similarities are that they both open and close a door. That is about the only similarity in them.

Q. And they both do have a pivot as they move about center? [439]

A. Yes, everything that moves I guess has to have a pivot. The pivot type has only one. It is an entirely different operation from the jamb hardware.

\* \* \*

### HAROLD E. BURTON

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Fulwider:

Q. What is your business, Mr. Burton?

A. In the overhead door business.

Q. What phase of that business are you engaged in?

A. Manufacturing the door and [440] installation.

(Testimony of Harold E. Burton.)

Q. About how long have you been in the installing business? A. 1932.

Q. Have you in the course of your activities in the manufacturing and installing of doors had occasion to install Tavart, Winchel, and Sturdee hardware? A. Yes.

Q. Will you tell us which of those three brands you use the most of at the moment?

A. Winchel.

Q. Will you tell us why that is?

A. That is from a competitive standpoint, the reason we use mostly Winchel.

Q. You say it is cheaper?

A. It is cheaper and it is quicker to install.

Q. Do you ever use any Sturdee hardware?

A. Yes.

Q. Is there any particular reason or time—put it this way: When do you buy Winchel and when do you buy Sturdee?

A. We use Sturdee on our scattered jobs and our non-competitive jobs.

Q. And you use Winchel on the others?

A. On the competitive jobs.

Q. You have, however, hung Tavart hardware in times gone [441] by?

A. We have hung a lot of Tavart hardware.

Q. Have you had trouble with the Tavart hardware with the pivot bolt changing its position in response to hard usage of the door?

A. Do you mean the shoulder bolt on the plate?

Q. Yes.

(Testimony of Harold E. Burton.)

A. Yes, we have had a little trouble with his slipping.

Q. Have you ever had any similar trouble with Winchel type hardware, the foot bracket slots going out of adjustment?

A. Do you mean the slots on the angle-iron?

Q. Yes.           A. Yes.

Q. Have you had any such trouble with Sturdee type hardware?

A. Not with the slots on the cantilever arm.

Q. Do you recall that Winchel hardware has a small horizontal slot in the jamb bracket where the cantilever arm hooks on to the bracket?

A. Well, it does have.

Q. Yes. Can you tell me what the function, if any, is of that horizontal slot?

A. Well, originally they used it for a door stop, but it didn't prove satisfactory, and you can get by with a little less head room by pulling the slot all the way back. [442]

Q. I will ask you if it is a fact that the Sturdee hardware, because of the overlapping of the two parts of the cantilever link, is any stiffer than the Tavart or Winchel link?

A. Yes, it is stiffer. Anybody would be able to see that.

Q. Is that an advantage?

A. It is an advantage from a service standpoint. There is not so much call-back on it on that account.

Q. And when you said that you used a Sturdee for—I think you said isolated jobs?           A. Yes.

(Testimony of Harold E. Burton.)

Q. Was that because you don't have as much of a service problem with Sturdee as you do with the Winchel?           A. That's right.

Q. To summarize that, in your opinion from personal experience in the door-hanging business, is Sturdee Econo-Jamb hardware less likely to get out of vertical adjustment than either Winchel or Tavart?

A. From my experience it doesn't get out of adjustment as easy as the other hardware.

Q. When you see a set of garage door hardware, we ought to say overhead door hardware, having a two-piece cantilever arm with slots in one of the pieces and bolts in the other to adjust the length of the arm, what manufacturer do you think [443] of?           A. I think of Sturdee.

Q. You are familiar with both pivot and jamb type hardware, are you not?           A. Yes.

Q. Will you tell us what similarities, if any, there are between pivot and jamb, in your opinion?

A. Well, they both have a pivot and they both open the door. That is practically the only similarity that I know of.

Q. They are different types of hardware, are they?           A. Yes, definitely, I think.

Q. A pivot type is considered different from the jamb type?           A. Yes. [444]

\* \* \*

FORREST A. KRIEGER

called as a witness by and on behalf of the plaintiff,



in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. What is your business, Mr. Kreiger?

A. Garage door business, fabricating and hanging.

Q. About how long have you been in that business?      A. '46.

Q. Are you familiar with Tavart and Sturdee hardware?      A. I am.

Q. Have you used both of them?

A. I have.

Q. And you have hung both?      A. Yes.

Q. What type of hardware do you use mostly now?      A. Sturdee entirely.

Q. Have you ever had any trouble with Tavart hardware with the pivot point that fits in the slot on the bracket going out of adjustment?

A. Yes. [445]

Q. Have you ever had any trouble with Sturdee hardware going out of adjustment, that is, vertical adjustment?      A. No.

Q. When you see a set of hardware having a two-piece cantilever arm with a slot and bolt connection, do you think of any particular manufacturer?      A. I do. \* \*

Q. Who is that?      A. Sturdee.

Q. Are you familiar with pivot type hardware, as well as jamb?      A. I am.

(Testimony of Forrest A. Krieger.)

Q. Is there any similarity in your mind between pivot type hardware and jamb hardware?

A. They are two different sets of hardware. They both open the door overhead, but there is no similarity between them. [446]

\* \* \*

RALPH A. BAYLESS

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. What is your business, Mr. Bayless?

A. Overhead door business.

Q. Do you manufacture and install?

A. Manufacturing and installing, yes.

Q. How long have you been in that business?

A. Since '45.

Q. Have you in the course of your business hung Tavart, Winchel and Sturdee types of hardware?

A. Yes, sir.

Q. Do you use all of those or any of those now?

A. No, sir; we exclusively use Sturdee.

Q. Have you ever had any trouble with Tavart type hardware with the pivot bolt going out of adjustment?

A. Yes, sir.

Q. Can you tell us a little more about that?

A. Well, on that slotted deal, you have such a

(Testimony of Ralph A. Bayless.)

small [447] bearing surface on there that if the door is dropped hard it just slides right up to the slot and, therefore, when the customer calls you up, you have to go back and adjust it back up so they won't call you up any more.

Q. Have you had any similar troubles with the Winchel type hardware where the slot is down at the foot bracket? A. Yes, the same trouble.

Q. You have had them go out of adjustment, too?

A. Yes.

Q. Have you had any similar trouble with any of the jobs that you have installed with Sturdee hardware? A. No, sir.

Q. Is it a fair statement to say, then, that in your opinion the Sturdee type hardware is less likely to go out of vertical adjustment than either Tavart or Winchel? A. Yes, sir.

Q. Being familiar with all three of those, and other types of hardware on the market, when you see a hardware with a two-piece cantilever arm joined together for adjustment do you think of any particular manufacturer? A. Yes, sir.

Q. And who? A. Sturdee Steel.

Q. Are you familiar with pivot type hardware, also? A. Yes, sir. [448]

Q. And have you installed pivot type?

A. Yes.

Q. In your opinion is there any real similarity between pivot type hardware and jamb type hardware? A. None.

Mr. Fulwider: That is all.

(Testimony of Ralph A. Bayless.)

Cross-Examination

By Mr. Beehler:

Q. Mr. Bayless, when an item of Tavart hardware goes out of adjustment and you go back to fix it, what do you do?      A. Pardon?

Mr. Beehler: Will you read it, please?

(The question was read by the reporter.)

The Witness: In most all the cases we find out that the bolt has slipped in the slot.

Q. (By Mr. Beehler): What do you do then to fix it?

A. We set the door in a vertical position and tighten it back up again.

Q. Is that an awfully hard job?

A. No; but it takes time and costs money.

Q. Suppose you screw the bolt up a little bit tighter?

A. You would probably bust it. You can only get the bolt so tight.

Q. You can get it tight enough so it won't move, though, [449] can't you?

A. No, sir, not on Tavart.

Q. Do you have a wrench in your pocket?

A. No, I am afraid I don't.

Q. Will you tell us where you found a Tavart piece of hardware that did slip?

A. An address?

Q. Yes.

A. I couldn't get that without getting my books out.



(Testimony of Ralph A. Bayless.)

Q. You don't really remember any, do you?

A. Yes, I can remember some, but not the addresses.

Q. How many have you installed in all?

A. The only ones we have ever installed is where the customer has gone to the hardware store and bought it and insisted that we use their hardware that they bought to hang their door.

Q. That is your sole experience with Tavart hardware?

A. That's right; I would say 25 or 30 of them.

Q. Is that also true of the Winchel hardware?

A. Yes.

Mr. Beehler: No further questions.

### Redirect Examination

By Mr. Fulwider:

Q. Mr. Bayless, have you ever installed Coffey hardware? [450]      A. Yes, sir.

Q. Is there any essential difference between the Coffey hardware and the Tavart hardware?

A. No, not in principle.

Q. The Coffey hardware is illustrated—I call your attention here to Exhibit V; one of these pictures says "Coffey Overhead Doors, Inc." Now, you can't see any slot here, but there has been testimony that this bracket, this jamb bracket has a vertical slot and it is similar to the Tavart. Can you tell me whether or not that is a fact?

A. That is a fact.

(Testimony of Ralph A. Bayless.)

Q. You said you had installed Coffey?

A. Yes, sir.

Q. In any substantial quantity?

A. Quite a few.

Q. About how many or over how long a period of time?

A. I would say about eight, nine hundred of them in a year.

Q. Did you have any trouble with the Coffey hardware going out of vertical adjustment?

A. Yes, sir.

Q. What did you do as a result of that?

A. Started manufacturing it myself and eliminating the slot.

Q. Later, I take it, you became a customer of Sturdee, [451] is that correct?

A. That is correct.

Mr. Fulwider: That is all.

### Recross-Examination

By Mr. Beehler:

Q. You know, don't you, Mr. Bayless, that Mr. Coffey doesn't manufacture any hardware?

A. I am speaking at the time Mr. Coffey manufactured or sold his hardware to us. That was in 1945.

Q. That was manufactured by Mr. Winchel, wasn't it?           A. Pardon?

Q. Wasn't that actually manufactured by Mr. Winchel?

(Testimony of Ralph A. Bayless.)

A. I don't know who manufactured it. Coffey sold it to us. [452]

\* \* \*

ROY O. WALIZER

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. Mr. Walizer, what is your business?

A. Overhead doors.

Q. What branch of the business are you in?

A. Fabricating and installation service.

Q. How long have you been in that business?

A. Since 1945.

Q. And in your experience have you had occasion to hang Tavart, Winchel, and Sturdee—that is, doors with Tavart, Winchel, and Sturdee hardware?

A. Yes and no. I have installed Tavart and Sturdee, but no Winchel. I have seen it, but I have never installed it.

Q. Have you ever had any trouble with Tavart doors, that is, doors with Tavart hardware, going out of vertical adjustment by reason of slippage of that pivot piece? A. That's right, I have.

Q. Have you had any similar trouble with Sturdee doors [453] going out of the vertical adjust-

(Testimony of Roy O. Walizer.)

ment by reason of any slippage in the cantilever link?

A. Not since they came out with the Econo set.

Q. I should have modified my question that way. That is the two-piece link that we have seen here in court?

A. That's right.

Q. You haven't installed Winchel doors?

A. No, I never installed any Winchel.

Q. Are you sufficiently familiar with the various kinds of hardware on the market to form an opinion when you see some hardware with a two-piece cantilever arm, the two pieces held together by bolt and slots?

A. I would say it was Sturdee's. It is the one I use all the time. That is the only one I know of is Sturdee.

Q. You don't know of anyone else that is now manufacturing it?

A. I did use a couple of sets of Olympic that had that. In a bind, I would run over to Builders Emporium from Burbank to Van Nuys.

Q. Do you know whether or not Olympic was manufactured by Sturdee?

A. Yes, at that time it was.

Q. Have you seen any of the Olympic hardware recently?

A. Yes, I got a set two weeks ago.

Q. How was it constructed? [454]

A. Very similar; in fact, it was practically the same, only lighter.

Q. Did you think it was made by Sturdee?



(Testimony of Roy O. Walizer.)

A. No; I knew it wasn't.

Q. Why?

A. I know it wasn't built by Sturdee. There is no comparison. There was comparison in the cantilever arm and pattern, and everything looked the same, but it was a much lighter set of hardware.

Q. A cheaper set? A. Yes.

Q. Structurally the same? A. Yes.

Q. Have you ever hung any pivot type hardware? A. Yes, several sets.

Q. In your opinion is there any substantial similarity between pivot type hardware and jamb type hardware?

A. None at all, as far as I am concerned. [455]

\* \* \*

### ROSCOE FOWLER

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows: [456]

\* \* \*

### Cross-Examination

By Mr. Goodman:

Q. Mr. Fowler, I direct your attention to your deposition which is in evidence in this case, taken on August 30, 1951. At page 14, commencing with line 2. I will read it into the record and you follow me as I read it, and then I will ask you a question:

“Q. Did you design it yourself?

“A. Yes, I developed it.

(Testimony of Roscoe Fowler.)

“Q. When did you go into production on that first?” A. About the same time.

“Q. And you said January, February, or March of 1949? Was that what you said?”

“A. That’s right.

“Q. Do you have here your production drawings, copies of your production drawings of that date?”

“A. We never had a production drawing.”

I direct your attention to page 15, line 19:

“Q. Do you have any records that show any drawings from which the die was made?”

“A. No. There wouldn’t be any records at all. There may, at that time, have been sketches of a few certain parts of the die, but there was [459] no complete drawing ever made.”

Were those questions asked you and did you give those answers? A. That’s right.

Q. And you have the white original drawing at your office now? A. That’s right.

\* \* \*

### Recross-Examination

By Mr. Goodman:

Q. Mr. Fowler, did you understand this question, on page 15 of your deposition, to call for a production drawing? I [460] will repeat it again:

“Q. Do you have any records that show any drawings from which the die was made?”

“A. No. There wouldn’t be any records at all.

(Testimony of Roscoe Fowler.)

There may, at that time, have been sketches of a few certain parts of the die, but there was no complete drawing ever made.”

Now, Mr. Fowler, is Defendants’ Exhibit P a complete drawing of the overhead hardware in suit? Answer yes or no.

A. That is the mystery drawing. I don’t know anything about it.

Q. Can you answer the question as to whether or not it is a complete drawing of the hardware in suit? A. I don’t know.

Q. Will you look at it?

A. I don’t believe I could study that drawing in less than a half day. If you want me to look at it, I will be glad to do it. But you certainly can’t look at a drawing with forty-some parts on it and decide if they are all——

Q. If you look at it, study it for two or three minutes, can you tell the court whether it approximately contains all of the——

A. I would say that without looking at it. [461]

\* \* \*

#### Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of November, A.D. 1951.

/s/ VIRGINIA K. PICKERING,

/s/ S. J. TRAINOR,

Official Reporters.

[Endorsed]: Filed August 11, 1952.

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PLAINTIFF'S EXHIBIT No. 20

VICTOR M. CARTER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Fulwider: [29\*]

\* \* \*

Q. And as I understand it, Mr. Fowler, doing business as Sturdee Steel Products Company, boxed that hardware for you and sold it to you in cartons with the name "Olympic" already on the carton, did he not? [35]

A. Yes, we purchased them with the name "Olympic" on the carton.

Q. And the cartons had instruction sheets in them?

---

\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



(Testimony of Victor M. Carter.)

A. You mean instruction sheets packed in the——

Q. Yes.           A. Yes, sure. [36]

\* \* \*

Q. You kept the same name? It was always Olympic [41] hardware?

A. Olympic is our name.

Q. That is your trade-mark?           A. Yes.

Q. So all the hardware you have sold, at least in the last couple of years, has been Olympic hardware?           A. Sure.

Q. You are still using "Olympic"?

A. Sure, "Olympic" is our name, yes.

Q. Do you use any other names for garage hardware besides "Olympic"?

A. No, Vimcar hardware is under the name of Olympic. [42]

\* \* \*

### JADE M. DONNER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Fulwider: [57]

\* \* \*

Q. Do you have any personal knowledge of any advertising material, cuts, photos, or other advertising aids delivered to Vimcar by Sturdee Steel Products or Mr. Fowler?           A. No.

(Testimony of Jade M. Donner.)

Q. Did you ever see any such?

A. I don't recall whether Mr. Fowler did have any literature he supplied us or not. I don't recall.

Q. You don't know whether he supplied you with photos?

A. Are you talking about photos or cuts?

Q. Both. [73]

A. I don't recall photos. I don't quite recall any literature.

Q. Do you know whether he ever supplied you with any cuts?      A. I don't recall.

Q. Or any other material of that kind in the way of illustrations or pictures of items?      A. No.

Q. To be used to reproduce pictures of the items he was furnishing you?

A. I don't think so because all the material he had was printed with his label and we were not selling his label of merchandise, and I doubt if we had used it even if he had supplied it.

\* \* \*

Received in evidence November 8, 1951. [74]

## DEFENDANT'S EXHIBIT B

In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 13002-HW

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, VICTOR M.  
CARTER and MORRIS J. HALOPOFF,  
Defendants.

## DEPOSITION OF ROSCOE FOWLER

the plaintiff herein, called as a witness by the defendants, pursuant to Notice hereto annexed, on Thursday, August 30, 1951, at 10 o'clock a.m. of said day, in the offices of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles 14, California, before C. W. McClain, a Notary Public in and for the County of Los Angeles, State of California.

Appearances:

For the Plaintiff:

MESSRS. FULWIDER &  
MATTINGLY, By  
ROBERT W. FULWIDER, ESQ.

For the Defendants:

HUEBNER, BEEHLER,  
WORREL & HERZIG, by  
VERNON D. BEEHLER, ESQ., and  
BENJAMIN J. GOODMAN, ESQ.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Beehler: Will you swear Mr. Fowler, Mr. Notary?

ROSCOE FOWLER

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Beehler:

Q. Give your full name for the record, please, Mr. Fowler.           A. Roscoe Fowler.

Q. And your address?

A. Business or residence?

Q. Well, give us your business address first.

A. 6820 Brynhurst Avenue.

Q. And your residence address?

A. 633 31st Street, Manhattan Beach.

Q. You are the patentee, are you not, of the patent in suit, No. 2,516,196?

A. If that is the number.

Q. Well, I will show you the patent (showing same to the witness).           A. Yes, I am.

Q. And you are the plaintiff in this litigation?

A. Yes.

Q. What is the name that your business goes by?

A. Sturdee Steel Products Co.

Q. And the present address of that company is the [2\*] same as you gave here a minute ago as your address?           A. Yes.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Is that a partnership, a corporation, or what form of business is it?

A. Single ownership. I am the owner.

Q. When was that business organized?

A. About 1903, I believe.

Q. Did it have the same name in 1903?

A. It was called the "Sturdee Overhead Door Company."

Q. That was in 1903?                   A. Yes.

Q. Who was the owner of the business then?

A. J. E. Kendee, and Mr. Allison—I don't know his initials.

Q. What products did that company make, if you know?

A. It had door hardware and it had doors, overhead doors.

Q. Will you describe briefly what kind of overhead door hardware that company made in 1903, if you know?

A. It was the original overhead door hardware type, which was pivot type hardware. I have no idea what it looked like at that time. I have never seen any of it.

Q. When was your first acquaintance with this business, which you say was started early in 1903?

A. June of 1942, I believe—June or thereabouts. [3]

Q. What was the nature of your acquaintance with the business then? Did you buy it?

A. I bought it, yes.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. What products were they making in 1942, when you bought it?

A. Overhead doors, hardware and doors.

Q. What kind of hardware was it?

A. It was pivot type and jamb type.

Q. Can you describe the jamb type hardware that the company was making in 1942?

A. It would be a lot easier to show you a picture of it.

Q. Well, if you have a picture I would be happy to look at it.

A. We have all the literature from away back. We had a fire about a year ago, and some of it was destroyed. It is in that first folder, I believe. I believe there is a picture of it there.

Mr. Fulwider: Is this a picture of it?

A. Not the original. I am sorry, but it looks like I haven't got the folder. I don't know what happened to it. We probably left it laying some place.

Mr. Fulwider: It is probably on your desk.

A. However, as far as the looks, there is very little difference in the looks.

Mr. Fulwider: If you don't want to go quite so far [4] back, he can probably describe it.

Mr. Beehler: Yes; I am content to do it that way, or if there are any drawings we are content with that.

The Witness: Unless you are completely familiar with the hardware, it wouldn't look a lot different.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Mr. Beehler: May we introduce this photograph as an exhibit, so that we will have something to tie our testimony to?

Mr. Fulwider: Yes.

Mr. Beehler: I offer in evidence this photograph as Defendants' Exhibit No. 1, as illustrative of jamb type garage door overhead hardware.

(Said photograph was marked Defendants' Exhibit No. 1.)

Q. (By Mr. Beehler): With reference to the hardware shown in the photograph, so that the record may be clear, was it your statement that that was the kind of hardware manufactured by Sturdee in 1942? A. Approximately, yes.

Q. Do you know the circumstances under which that photograph was taken, or what the object was of the photograph?

A. It was taken for advertising purposes.

Q. Do you recall when?

A. Approximately '44 or '45.

Q. The hardware pictured, then, in the photograph, is hardware which you manufactured in about 1944; is that [5] true? A. That's right.

Q. Was that the only kind of jamb type hardware which Sturdee was making in 1944?

A. As I remember, it is the only kind.

Q. From whom did you purchase the business when you did so in 1942? A. Mr. Kendee.

Q. Who else was associated with the business at that time?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. With the Sturdee business?

Q. With the business you purchased, yes.

A. Mr. Kendee was the only one at that time.

Q. Do you know Mr. Kendee's full name?

A. J. E. Kendee.

Q. Do you know his address?

A. Lancaster. I don't know the box. But he owns a ranch near Lancaster.

Q. Lancaster, California? A. Yes.

Q. After you purchased the business, who was associated with you, in 1942?

A. Who was associated with me?

Q. Yes. A. As a partner?

Q. Did anyone own it with you at that [6] time? A. No.

Q. Who worked for you at that time?

A. In 1942?

Q. Yes. A. Howard Wilson.

Q. Do you know his address?

A. No, I don't.

Q. What was his job with you?

A. He was office manager.

Q. Was there anyone else, in 1942, working for you? A. You mean in that business?

Q. Yes, in the Sturdee business.

A. Yes, there was employees working in the shop.

Q. Will you name those, if you can?

A. William Patterson.

Q. And his job was what?



## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. Just a workman.

Q. Anyone else? A. Clarence Lang.

Q. Lang? A. I believe that's right.

Q. Also a workman? A. Yes.

Q. Anyone else?

A. Well, there were probably quite a few, but I don't recall any of the rest of them. [7]

Q. Do you know the address of either William Patterson or Clarence Lang?

A. I don't know the address of Clarence Lang, but William Patterson still works for me.

Q. Clarence Lang, then, does not still work for you? A. No.

Q. Are there any other persons still working for you who were working for you at that time?

A. No, nobody else. Well, now, my auditor. However, he is a part-time man.

Q. What is his name?

A. Vernon C. Harp.

Q. Was there any trade name applied to the jamb hardware which you made in 1942, and, if so, what was it? A. "Sturdee."

Q. Were the goods actually marked with the "Sturdee" name stamped or otherwise applied to the goods?

A. I can't recall. There may have been a stencil mark on them.

Q. How long have you been acquainted with the overhead garage door hardware business?

A. Since 1942.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. And your acquaintance didn't antedate, then, your taking over of the business you now have?

A. No.

Q. What was your part in that business when you [8] took it over? Were you engineer or production man, or what?

A. I was the whole thing.

Q. Did you do any designing of jamb type hardware?

A. Yes. I developed all the hardware that has been developed.

Q. You have made changes in the jamb type hardware since 1942?           A. Yes.

Q. What was the first change you made from the hardware pictured in the photograph, Exhibit 1?

A. There have been so many changes that I just couldn't tell you. I truthfully don't remember.

Q. If I said "the first major change," would that help you answer the question?           A. Yes.

Q. What time was the first major change in that type of hardware made?

A. I don't know what to say about that. I believe I next purchased a hardware concern, with all patents and patterns, etc. That is the Towers Company.

Q. They were hardware manufacturers?

A. Yes, a very small company.

Q. What kind of items did they manufacture?

A. The jamb hardware alone, jamb hardware only.

## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. When you say "jamb hardware," do you mean a complete jamb hardware unit? [9]

A. Yes.

Q. Or just parts?

A. No—a complete unit.

Q. What did the unit look like which they manufactured?

A. Like that right there (indicating), practically the same as that.

Mr. Beehler: The witness shows us a circular captioned "Sturdee 'Easy to Lift' Overhead Garage Door Hardware," on the front page of which is pictured a garage door with a little girl standing in front of it, and then a detail picture on one side of the door showing the hardware, and further details on the inside two pages, showing separately all of the parts of the jamb hardware, the picture on page 3 of the inside of the folder—I call your attention to the fact that on page 3 the type of jamb hardware there pictured consists of a plate for attaching to the jamb at the side of the door, a main arm to an angle iron labeled "Door Support, Structural Shape," another arm captioned "Cantilever or Guide Arm," attached to the plate at one end, and also to a short angle iron labeled "Door Support Feet Structural Shape," a spring tension adjuster, consisting of a separate short strip, with many holes in it, and a long coiled spring. With respect to those items which I named, they are essentially the same items that Sturdee was also

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

manufacturing at that time, is that not true, as pictured [10] in Defendants' Exhibit 1?

A. No, that isn't right. I showed you a picture. That is approximately the hardware I bought. Those other items you were looking at were improvements.

Mr. Beehler: The witness refers now to the front page in this circular, which I offer in evidence as Defendants' Exhibit No. 2.

(Said circular was marked Defendants' Exhibit No. 2.)

Q. (By Mr. Beehler): Now, Mr. Fowler, when you mentioned "improvements," those were the items which I enumerated on page 3, I believe you said, of that circular? A. Yes.

Q. When were those improvements made?

A. It would be impossible for me to tell you when those improvements were made. There were several of them there, and, as time went on, the improvements were built into the hardware.

Q. What was the date of that circular you showed me, Defendants' Exhibit No. 2?

A. I can't tell you that.

Q. Was it as early as 1944?

A. Oh, it would be '44, '45 or '46.

Q. It would at least be as early as 1946?

A. At least that, I would say.

Q. Would you say?

A. Yes, I would say so. [11]



Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Was there only one type of jamb hardware that was manufactured by Towers?

A. As far as I know, that was all.

Q. Do you know what their trade name was, if any?

A. Towers.

Q. Did you buy the entire business of Towers?

A. I bought all their rights and patterns and literature, and so forth, in the going business.

Q. Did they have any patents that you bought?

A. They thought they had, and it turned out they didn't have.

Q. You didn't buy any patents from them, then?

A. I really wouldn't know.

Q. We were talking a little while ago about the first major change that was made in the jamb type hardware. I am not sure we got from you what you would consider the first major change.

A. The first major change, I would say, was the steel bracket.

Q. The bracket is the large piece that fits against the jamb; is that correct?

A. Yes.

Q. What was the bracket before you used the steel bracket?

A. Cast.

Q. Was there any difference in the steel [12] bracket, with reference to holes or slots, or anything of that kind? There was no change in the character of the——

A. As I remember, there was no other change made at that time.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. What would you say, then, was the next succeeding major change?

A. In that particular set of hardware?

Q. Yes.

A. I rearranged the measurements on the particular set, I believe, and, if I remember correctly, we changed the bearings, improved the bearings.

Q. Whereabouts where the bearings located?

A. Connected the power arm to the bracket.

Q. By "power arm," that is the larger of the two arms?      A. Yes.

Q. And that is located above the other arm?

A. That's right.

Q. After the improvement which you just now mentioned, what, then, would you say was the next major improvement?

A. As I remember, after that came the later type hardware, with the two-piece cantilever arm and the decreased head room.

Q. When did that take place?

A. I believe about 1949, February—January, February, [13] maybe March.

Q. Did you design it yourself?

A. Yes, I developed it.

Q. When did you go into production on that first?      A. About the same time.

Q. And you said January, February or March of 1949? Was that what you said?

A. That's right.

Q. Do you have here your production drawings,

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

copies of your production drawings of that date?

A. We never had a production drawing.

Q. How did you make it, or how did the men in the shop make it?

A. The first set of hardware was made by me, and then the tooling was made from the parts. We first developed the parts, and the tooling was made from the parts.

Q. Do you have any drawings of that now?

Mr. Fulwider: We have got some drawings. They are little sketches which were made. We will let Mr. Fowler tell who they were made by.

The Witness: All of those machine parts, you see, had to be made on the outside. They were made by Carson—screw machine parts.

Q. (By Mr. Beehler): And the screw machine parts consist of what?

A. Bearings and bushings. [14]

Q. Who made the steel plates?

A. We did.

Q. From whom was the metal purchased?

A. Well, Rawlins, Jorgensen, Payne—take your pick—any steel jobber.

Q. How were the steel—I think you mentioned the brackets—brackets made? Was that a stamping?

A. It was a stamping, yes.

Q. And you had a die for the stamping?

A. Yes.

Q. Who made that die?

A. We made the die ourselves.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. How were the parts of the cantilever arms made? A. Stamped.

Q. And they were made from a die?

A. Yes.

Q. And who made that die?

A. The Sturdee Steel Products.

Q. Do you have any records that show any drawings from which the die was made?

A. No. There wouldn't be any records at all. There may, at that time, have been sketches of a few certain parts of the die, but there was no complete drawing ever made.

Q. Which of the workmen in your shop made the dies for the split or divided cantilever arms?

Mr. Fulwider: By "divided cantilever arms," what do [15] you mean? We were talking about bracket plates a minute ago.

Mr. Beehler: I also talked about cantilever arms as being made in two parts. A. Yes.

Q. (By Mr. Beehler): And that there were dies made to make two parts of the cantilever arm?

A. Yes.

Q. Which of the workmen made the dies to make the parts of the cantilever arms?

A. I am trying to think. We had several tool and die makers, and right at this time I don't remember which one of them did it.

Q. Can you give us their names?

A. They come and go.

Q. Will you give us the names of those who



## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

were working for you at that time who may have had a part in the making of those drawings?

A. I could go back in my records and tell you who worked there at that time. But there was a man named White that did quite a bit of work, but I couldn't say if he was there in the first part of 1949 or not. However, I would say the tooling on that set wasn't finished until the middle or latter part of 1949, which means punch press work, punching holes.

Q. Who were the punch press operators?

A. I don't know who the punch press operators were. [16] We have had dozens of them there. They come and go all the time. If you want a list of my employees I would be happy to give it to you, but to pick any certain ones out, I couldn't do that. I don't know.

Q. Do you have the list here?

A. No, I don't have a list here.

Q. Will you, then, provide us with the names of the punch press operators who worked for you in January of 1949? Can you get that from your records?

Mr. Fulwider: That is all right.

The Witness: That is all right.

Q. (By Mr. Beehler): Could you have it for us this afternoon, or will it take you longer than that to dig it out?

A. How long will we be here? If it is like it

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

was yesterday, the answer would be no. It will not be much of a problem, no.

Mr. Fulwider: I would say that we could have the bookkeeper bring the information down.

Mr. Beehler: That would be very helpful.

The Witness: Yes, I would be glad to do that.

Mr. Beehler: All right.

Mr. Fulwider: Off the record.

(Short discussion off the record.)

Q. (By Mr. Beehler): How many did you have with you in 1949? How many total employees did you have in 1949, in [17] about January, approximately?

A. I would say three, maybe two, not including myself.

Q. Are any of them still with you?

A. No. I don't know about that, either. I could be wrong. Bill Patterson, who was with me at the start, was away for quite a while, and I don't know if he was with me at that time or not.

Q. At the time you give us the names of the employees in 1949, in about January, will you also give us the names of your employees who were with you in September of 1948, please?

A. Yes.

Q. And the last addresses that you have for them on your books also? A. Yes.

Following are the names and last addresses of employees that I had in September, 1948:

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Albert Foster,  
6335 North Figueroa,  
Los Angeles 42, Calif.

William Patterson,  
4432 Manhattan Beach Blvd.,  
Lawndale, Calif.

Herbert Barrett,  
4937 W. 140th St.,  
Lawndale, Calif.

Robert C. Joslyn,  
2075 E. 3rd,  
Long Beach, Calif.

Robert Jones,  
Oklahoma City, Oklahoma.

Horace Crawford,  
3741 W. 58th Pl.,  
Los Angeles, Calif.

John Owen,  
560 33rd St.,  
Manhattan Beach, Calif.

Fred E. Land,  
11151 S. Yukon,  
Inglewood, Calif. [18]

Following are the names and last addresses of employees that I had in approximately January, 1949:

Phoebe Fowler,  
352 W. 105th St.,  
Los Angeles 3, Calif.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Rex Moffat ,  
4069 Rosecrans Blvd.  
Hawthorne, Calif.

Spencer Ramsdale,  
12628 S. Broadway,  
Los Angeles, Calif.

Jim Fowler,  
2004 Faymont,  
Manhattan Beach, Calif.

Victor Comihula,  
334 E. 99th St.,  
Inglewood, Calif.

Irene Csaba,  
3905 W. 117th St.,  
Hawthorne, Calif.

James Hampton,  
4229 Rosecrans,  
Hawthorne, Calif.

Arthur Kessler,  
8704 El Manor Ave.,  
Los Angeles, Calif.

William Patterson,  
4432 Manhattan Beach Blvd.,  
Lawndale, Calif.

John Owen,  
560 33rd St.,  
Manhattan Beach, Calif.



Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Frances Church,  
123 N. Fir,  
Inglewood, Calif.

Anna Soch,  
6802 Brynhurst,  
Los Angeles, Calif.

Bruce Johnson,  
(moved back East).

Ralph King,  
2120 S. Oak St.,  
Los Angeles, Calif.

Winifred Wattenbarger,  
3412 W. 71st St.,  
Los Angeles, Calif.

Leon Gates,  
13707 Crenshaw Blvd.,  
Hawthorne, Calif.

John Jordan,  
248 E. 103rd,  
Los Angeles, Calif.

Albert Foster,  
6335 N. Figueroa,  
Los Angeles 42, Calif.

Herbert Barrett,  
4937 W. 140th St.,  
Lawndale, Calif.

Robert Jones,  
Oklahoma City, Oklahoma. [18-A]

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. (By Mr. Beehler): I am going to show you now, Mr. Fowler, what I understand to be a current catalog, one of your firm catalogs, captioned, "The Revolutionary Sturdee Econo-Jamb," and I ask you if that is one of your catalogs? A. Yes.

Q. What is the date of printing of that catalog, do you know?

A. I haven't the slightest idea.

Q. Who was the printer?

A. Cardinal Lithograph.

Q. Cardinal Lithograph? A. Yes.

Q. I also show you, Mr. Fowler, a price list of "Commercial Overhead Door Hardware," bearing the name "Sturdee Steel Products Co.," the address there given being 6820 Brynhurst Avenue, and it says on the second page, which is labeled Page No. 1, "Effective January 2, 1951." I will ask you, are those your price lists?

A. They certainly look like it.

Mr. Beehler: I offer in evidence, then, as Defendants' Exhibit No. 3, the catalog captioned, "The Revolutionary Sturdee Econo-Jamb," and, as Defendants' Exhibit 4 I offer in evidence the price list of "Commercial Overhead Door Hardware," accompanied by the Dealers Net Prices, and I will staple this Dealers Net Prices to the other, so that it will not be separated from the exhibit as we talk about it. [19]

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

(Said two documents were marked Defendants' Exhibit No. 3 and Defendants' Exhibit No. 4.)

Q. (By Mr. Beehler): Now, I find in the Dealers Net price list that the first three items are given specific trade names, namely, "Deluxe Jamb Type," "Econo Jamb Type," "Lo-Head Jamb Type," and "Pivot Set." Will you describe for us, Mr. Fowler, the Econo Jamb Type hardware, and you may have reference to the circular, Defendants' Exhibit 3, and refer also to Defendants' Exhibit 1, if you wish, to make the comparison.

A. Well, how could I do better than this picture?

Q. Is the "Econo Jamb Type" of the picture identical with the hardware of Defendants' Exhibit 1, shown there in the photograph?

A. This (indicating)?

Q. Yes. A. Oh, no.

Q. What is the difference?

A. This is a newer type, a newer type hardware.

Q. Structurally what is the difference?

A. It is all steel.

Q. Are there other differences than that?

A. Measurement, yes.

Q. There are still more differences, are there not?

A. Well, the measurements. That is about it, I guess. [20]

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. Then in the Econo Jamb Type of Exhibit 3 there is a divided cantilever arm, is there not?

A. That's right.

Q. And there is not a divided arm in the earlier one?

A. That's right.

Q. And what is the difference between the two, in the way they are attached to the garage doors?

A. Both bolted to the door.

Q. Well, maybe I can be helpful there. There are two pieces of angle iron in the photograph, are there not, and a single piece of angle iron in the Econo Jamb Type?

A. That's right. It is all assembled on the door there.

Q. How long have you been making the Econo Jamb Type?

A. I think the name "Econo"—I believe we used the name "Econo" in the latter part of 1948. If I remember correctly, we used the name "Econo" when we changed from the cast bracket to the steel plate.

Q. Do you have here the literature which you had available for the Econo Jamb Type when you first adopted that name?

A. There is no literature on that particular set.

Q. What is the first literature up to date? When did you first put out literature for the Econo Jamb hardware? [21]

A. As I remember, it was in February, February of 1949.



## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. Who was the printer? A. Cardinal.

Q. May I ask you again what the date was when you first adopted the name "Econo Jamb"?

A. Oh, I couldn't remember just the date. It was some time the last part of 1948.

Q. What records of yours would show the date of adoption of that trade name?

A. Well, we have no literature. I frankly don't know just what would show it. Maybe sales tickets.

Q. Let me refer you now to another trade name used on the Dealers Net Price List, "Deluxe Jamb Type." Will you explain the difference between the "Deluxe Jamb Type" and the "Econo Jamb Type"?

A. It is a more rigid set of hardware, with practically the same measurements, but it is better built, with bronze bearings, etc., built for a heavier door.

Q. Does it have the same arrangement of parts?

A. Practically the same arrangement.

Q. Is the cantilever the same? A. Yes.

Q. Is the main arm the same?

A. As far as measurements were concerned, they are approximately the same. However, the "Deluxe" is channel [22] iron construction.

Q. Is the bracket the same?

A. No, the bracket isn't the same.

Q. What is the difference?

A. It is a two-piece bracket.

Q. Will you describe the two-piece bracket?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. It is a plate riveted onto angle iron.

Q. Aside from that difference, is it the same?

A. The measurements are about the same. But that is about it. It is a more substantial piece of hardware. Every part that can be bushed is bushed.

Q. With respect to the angle iron that fastens the hardware to the door jamb, is that the same on the "Deluxe" as on the "Econo"?

A. It is about the same.

Q. It is still a single long piece of angle iron; is that right?      A. Yes.

Q. Is there a gusset in the Deluxe jamb type used to attach the cantilever arm to the angle iron, as shown in the Econo jamb?      A. Yes.

Q. Do I use that term correctly—"gusset"?

A. We call it an extension on the door support.

Q. It is a little extra piece that sticks out on the angle iron?      A. Yes. [23]

Q. Now refer, please, to the third item on the Dealers Price List, indicated as "Lo-Head Jamb Type." Will you explain the differences that there are between the Econo Jamb Type and the Lo-Head Jamb Type for me?

A. The only difference is a rearrangement of the measurements.

Q. Rearrangement of which measurements, Mr. Fowler?

A. The measurements on the bracket and on the door support. The door support is the long angle that bolts to the door.

## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. The weight and character of arrangement of the pieces are otherwise the same; is that it?

A. Practically the same.

Q. And the style of the cantilever arm is the same?      A. Yes.

Q. The divided cantilever arm?      A. Yes.

Q. Two pieces?      A. Yes.

Q. And the Lo-Head uses the extension, does it?

A. Yes.

Q. When did you first start to use the trade name "Deluxe Jamb Type"?

A. Approximately the first part of 1949.

Q. And you did not use it before that?

A. I don't remember if I did or not. Maybe a few [24] months, one way or the other.

Q. When did you first start to use the term "Lo-Head Jamb Type"?

A. Oh, that must have been '46, maybe '45.

Q. You have always made the "Lo-Head Jamb Type" in the same way you now make it, have you not?      A. No.

Q. What was the difference?

A. Well, there is a linkage in the cantilever arm, I believe, three linkages, that made it different. It is quite a complicated thing.

Q. You have shown me here a one-page circular, captioned "Installation Instructions for 'Lo-Head,'" and also the caption "Sturdee 'Easy to Lift' Overhead Door Hardware"?

A. Yes.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Beehler: I offer this in evidence as Defendants' Exhibit No. 5.

May I correct my description of that circular. I described it as a one-page circular, but I should have said a four-page circular, with directions appearing on the two pages on the circular when the circular is opened up.

(Said circular was marked Defendants' Exhibit No. 5.)

Q. (By Mr. Beehler): Will you, Mr. Fowler, refer to this circular, please, Exhibit 5, and explain what the difference is between the Lo-Head Jamb Type hardware there [25] shown and the Econo Jamb Type hardware?

A. We eliminate the linkage.

Q. When you say "linkage," that refers to what arm or what part of the hardware?

A. What we term the "boomerang arm."

Q. And the boomerang arm, does that take the place of the cantilever arm in the Econo Jamb?

A. No.

Q. On the Lo-Head there is a main arm, isn't there?

A. Yes, there is a main arm on the Lo-Head.

Q. And I note, in addition to the main arm, there is a linkage, which consists of a relatively short arm attached to the plate, and a relatively long arm attached at one end to the short arm, and the other end to the door, and then a remaining



## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

arm shorter than the other two, and it is connected, is it not, between the main arm and the relatively short arm?      A. That's right.

Q. And those three arms comprise what you describe as the linkage; is that right?

A. That's right.

Q. And, comparing that with the Econo Jamb, there is a single divided cantilever arm on the Econo Jamb, instead of the arm consisting of the three parts?      A. Yes.

Q. Which was just described in the "Lo-Head"? [26]      A. Yes.

Q. When did you change from the Lo-Head construction of Defendants' Exhibit 5 to the Lo-Head Jamb Type construction which you refer to in the Dealers Net Prices?      A. What is No. 5?

Mr. Fulwider: No. 5 is this one that you were just looking at.

Q. (By Mr. Beehler): What was the date of that circular, Defendants' Exhibit No. 5, if you know?      A. I haven't any idea.

Q. Who printed that?

A. If I remember correctly, the Miller Advertising Company. They made quite a bit of literature for me.

Q. When did you first start manufacturing the Lo-Head Jamb Type as it appears in the circular Exhibit 5?      A. Well, around 1945 or '46.

Q. Did you sell those items to the trade?

A. Yes.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. Were they sold around and about Los Angeles County?      A. Quite a few of them.

Q. Can you give us the name of one purchaser of that particular Lo-Head Jamb Type hardware within the County of Los Angeles?

A. The Modern Overhead Door Company, of Glendale.

Q. They have one of the Lo-Head—— [27]

A. They used that hardware, and they installed quite a bit of it.

Q. When did they first begin to purchase the Lo-Head type?

A. I wouldn't know that—probably '45 or '46—maybe '47.

Q. Do they still use that Lo-Head Jamb Type hardware?

A. No. That isn't manufactured any more.

Q. When did you cease to manufacture that style of Lo-Head Jamb Type hardware?

A. I believe the summer or very last part of 1949.

Q. You secured a patent, did you not, on that Lo-Head Jamb Type hardware, as illustrated in Defendants' Exhibit 5?

A. I secured a patent on that, I believe. Mr. Smythe would know.

Q. I show you a patent to R. Fowler, et al., No. 2,523,267, dated September 19, 1950, and I ask you, does the illustration on the patent drawing there correctly show the Lo-Head Jamb Type hard-

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

ware like we were talking about in connection with Exhibit 5?

A. There was never one made like that.

Q. What is the difference between that and the Lo-Head Jamb Type of Exhibit 5?

A. Well, to start with, the measurements are all different. [28]

Q. Anything else?

A. And we used a different type bracket.

Q. What was the difference in the bracket.

A. Just a different size, constructed differently.

Q. When you say "constructed," you mean a different material?

A. No. The original intention was to use that set of hardware for an eight-foot high door, as well as a seven-foot, which was not practical. That is the reason we never made the hardware like this. In other words, you will notice there is means for extending it out here, and also the cantilever arm. That was so we could use that on an eight-foot door, as well as a seven-foot door. But the set of hardware wasn't actually going on a seven-foot door. We did sell a lot of them, but they had to be used on a very light door.

Q. When you say there was a means for extending the cantilever arm, I take it you refer to the arm 15 on the patent drawing?

A. The arm 15.

Q. In any event, the arm 15 shows a cantilever arm which could be extended?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. That's right. That arm could be extended.

Q. And in the construction in the Lo-Head Jamb Type hardware, did you make some that had the cantilever arm extended? [29]

A. No.

Q. Did you ever make any that had a cantilever arm extended in that way?

A. No.

Q. Did you ever make any that had the main arm extendible, the way it is shown in the patent?

A. No.

Q. Where are the drawings that you submitted to the patent lawyer, which showed him how to make the illustration of the patent?

A. The patent lawyer took his own measurements and made his own drawing.

Q. What did he take the measurements of?

A. The hardware.

Q. Where was the hardware?

A. Installed on a door in the plant.

Q. Did you use the door as a means of access to your plant?

A. No. It was to be used only for development purposes, in the middle of the plant.

Q. Where was the door located?

A. I would say the back part of the shop.

Q. What were the premises on the opposite sides of the door?

A. It was just one big room, and it was right in the middle. [30]

Mr. Fulwider: I might say that Mr. Fowler has



## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

a big frame in his plant, with a big door, that he uses for experimental purposes.

Q. (By Mr. Beehler): What was the size of that door? A. That door was 7 by 16.

Q. Where is the hardware that was used on the door from which the measurements were taken for the patent application now?

A. That is a sixty-four dollar question. I haven't any idea.

Q. You don't know? A. No.

Q. Where are the drawings you used when you first manufactured the Lo-Head hardware, as shown in Exhibit 5?

A. I think I told you earlier that we developed the hardware, and then we made dies and built hardware from the already developed parts.

Q. Do you have your sales records here?

A. Yes.

Q. Will you pick from your sales records the first sale of the Lo-Head garage door hardware?

A. I wouldn't even attempt to, because I haven't any idea. I will give you the records of '48 and '49.

Q. Well, you told us that this Lo-Head garage door hardware was manufactured in 1945. Now I want to see the [31] records which show where those items of hardware were sold in 1945.

Mr. Fulwider: He didn't bring any records prior to 1948. We could have, but I couldn't see

## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

their relevancy, what relevancy they would have here.

Mr. Beehler: You have records?

Mr. Fulwider: It is conceded that this particular type hardware you are talking about was made more than a year before the patent was filed, and so we brought the records for the year 1948. I can't see that they are material later than that. We can show you 1945, '46 and '47, if you wish them.

The Witness: We did have a fire, and they may be there and they may not.

Mr. Beehler: Well, the relevancy is this, that the witness says that the hardware that is manufactured is not, in certain respects, like the hardware of the patent. The illustration shows some differences.

Mr. Fulwider: We concede that it was made like the illustration earlier than the earliest date you want to prove.

Mr. Beehler: Will you concede that it was made like the patent?

Mr. Fulwider: No. The testimony is to the contrary.

Mr. Beehler: That is what we would like to clarify.

Q. (By Mr. Beehler): Will you provide us, then, with [32] the names or with the identity of the sales of the first items of Lo-Head hardware which you sold in and about Los Angeles County, let us say, Lo-Head hardware of the general character illustrated in Exhibit 5?

A. If I remember correctly, Modern Overhead

## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Door installed the hardware, but, frankly, I don't know the year they started that business.

Q. They were the first ones?

A. No, I wouldn't say they were the first ones, but they are the ones I happen to remember now, and they are close by.

Following are names and addresses of purchasers of "Lo-Head" hardware, in the years 1945 and 1946, in Southern California:

Belheimer & Walker,  
1037 E. Green St.,  
Pasadena, Calif.

J. B. Harvick,  
1957 W. 84th Pl.,  
Los Angeles, Calif.

E. R. Porter,  
Hermosa Beach, Calif.

San Jose Hardware,  
San Jose, Calif.

Calif. Hardware Co.,  
500 E. 1st,  
Los Angeles, Calif.

Burbank Lumber Co.,  
35 E. Olive St.,  
Burbank, Calif.

Acme Hardware Co.,  
150 S. LaBrea,  
Los Angeles, Calif.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Litchfield Lumber Co.,  
217 N. Glendale,  
Glendale, Calif.

Walt Nordstrom,  
435 E. Tamarack St.,  
Inglewood, Calif.

S. Mariani & Sons,  
3362 Mission St.,  
San Francisco, Calif.

Western Metal Supply Co.,  
7th & K St.,  
San Diego, Calif.

Imperial Hardware Co.,  
437 American Ave.,  
Long Beach, Calif. [33]

There were many other purchasers of this hardware having places of business other than in Southern California.

Q. How did you handle sales of your hardware at that time?      A. Installers and jobbers.

Q. Would you call Modern an installer?

A. Yes.

Q. Can you give us the name of a jobber you had at that time who handled the Lo-Head?

A. If I remember correctly, Baker Hamilton, at San Francisco.

Q. Did you have a jobber in Southern California?

A. Yes. Yes—Reserve Warehouse, at Oceanside.



Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Did they purchase very much Lo-Head overhead hardware?      A. Yes.

Q. Were there any other jobbers or installers of [33-a] that hardware in Southern California?

A. Yes, there were several of them. Lipton, at Long Beach.

Q. Were they wholesalers or installers?

A. Installers.

Q. Any others?

Mr. Fulwider: Why don't we do this: Have your bookkeeper call in and give the names of the customers in Southern California in 1945 and 1946, and if they want to go out and look at all the doors, that is fine.

The Witness: That is all right with me. I would rather do that than testify to something I am not sure about.

Mr. Beehler: That is fine.

Mr. Fulwider: Why don't we do it at the recess?

Mr. Beehler: Yes, and give us the addresses, too, at the same time.

Mr. Fulwider: Yes. May I ask a question now?

Mr. Beehler: Yes.

Mr. Fulwider: I am not sure in my own mind whether the doors sold generally had straight cantilever arms, cantilever arm segments, or whether they were curved a little bit, like what you call a boomerang arm.

The Witness. Originally, I think there were

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

approximately 400 of those sold, with the cantilever original arm.

Q. (By Mr. Fulwider): And then you changed it to a curved arm? [34] A. That's right.

Q. (By Mr. Beehler): Which is the arm you are talking about, which was curved, or which wasn't curved?

A. This little arm right here, from here to here (illustrating).

Q. In other words, what I described, I think, as a relatively short part of the cantilever arm?

A. Yes, that's right.

Mr. Fulwider: As I remember it, you first used the straight arm, and then you put a curve in it to make it work better? A. Yes.

Mr. Fulwider: And you may find both straight ones and boomerang ones. Otherwise, they are the same, as I understand.

Q. (By Mr. Beehler): Do you recall when you first—did you first have it curved or straight?

A. First it was curved.

Q. And then changed to straight?

A. Yes.

Q. Do you recall when you made the change?

A. We only made a very few of them with the straight arm; I would say approximately 400; and that means that about 30 days after we made the hardware originally we changed it.

Q. I now show you, Mr. Fowler, one page, bearing the [35] name "Sturdee Steel Products.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Hardware Manufacturers," in a yellow elliptical figure on the top, and indicated as "Jobber's Price List, Effective September 5th, 1948," and I ask you, is that one of your price lists?

A. Yes, it is.

Mr. Beehler: I offer it in evidence as Defendants' Exhibit 6.

(Said Jobber's Price List was marked Defendants' Exhibit No. 6.)

Q. (By Mr. Beehler): I take it that it is true that you were making the items appearing on this list on September 5, 1948; is that correct?

A. Yes.

Q. How long prior to September 5, 1948, were you making the items appearing on that list?

A. I wouldn't have any way of knowing. I don't know. Judging from this right here, we hadn't done anything to lower the headroom at that time, so that was probably the same as the original hardware that we made.

Mr. Beehler: May I have that answer read, please?

(The answer was read by the reporter.)

Q. (By Mr. Beehler): What change did you make in the hardware to lower the headroom?

A. Well, it is a rearrangement of the measurements.

Q. Would that be the only change necessary?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. We put an extension on the door [36] supports.

Q. By "extension," you mean an extendible cantilever?

A. No. I mean the extension fastened to the door supports. I believe you referred to it as the "gussets."

Q. Aside from that change, there would be no other change made?

A. We changed the heads, changed the head trim.

Q. You changed the head trim?

A. That isn't entirely right. There has to be some means of adjustment on the top, to connect the cantilever arm to the door support.

Q. You had such adjustable means when the items on this price list were first sold, did you not?

A. No. You see, this arm here does not connect with the door support. Therefore, when this arm here is connected with the door that makes the adjustment. The cantilever arm is connected to the door and that makes the adjustment.

Q. In that door support you were talking about the angle iron, that fastens to the door?

A. Yes.

Q. On Exhibit 5?           A. Yes.

Q. When did you first change the construction from the angle iron in two pieces, like that shown on Exhibit 5, to an angle iron in a single [37] piece?



## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. Well, somewhere in February or March, 1949, I believe.

Q. And you say you never used the angle iron in the single piece before January or February or March of 1949?      A. That's right.

Q. Do you recall whether or not you ever made a sale of your hardware to Lewis Patty, of 130 Mar Vista, in Pasadena?

A. 130 Mar Vista, Pasadena?

Q. Yes.

A. By golly, I don't remember that. What year?

Q. I don't know what year, but I have got a good idea.

A. Well, the reason I question that, we never sold to individuals. A very, very small amount of that was ever sold out of our place to individuals.

Q. Do you recall making jamb type hardware in your plant, where the plate that was fastened to the jamb had a slot in it, where the cantilever arm was attached to the plate?      A. No.

Q. Is it your statement that you never made a jamb type hardware of that character?

A. If I did, I don't remember it. No, I never made any hardware like that.

Q. Did you ever make, in your plant, any jamb type [38] hardware where the plate had more than one hole drilled for the attachment of the cantilever arm, that is, so that you could attach the cantilever arm in one of two or more holes?

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. I never made that. I never made any hardware like that.

Q. When you say you never made it, do you mean that you never made it for sale, or that you never made it at all?

A. We may have experimented with something like that, but I never made it for sale.

Q. What was the purpose of having the cantilever arm extendible so that you can make it shorter or longer? What does that do to the door?

A. It changes the headroom.

Q. Is that all it does?

A. Changes the headroom—yes, that is all.

Q. Does it change the headroom by cutting a slot in the plate and moving the location of the end of the cantilever arm that fastens on the plate?

A. That changes the headroom very, very little. It isn't entirely practical.

Q. Does it change the headroom by putting two or three holes in the plate and changing the location of the end of the cantilever arm that fastens on the plate?      A. Yes.

Q. On this price list of Defendants' Exhibit 6, I find itemized Single Lo-Head Jamb Type and Double Lo-Head [39] Jamb Type. What was the difference between those two kinds of Lo-Head Jamb Type hardware?

A. The Double Jamb Type Lo-Head had heavier springs.

Q. Were there any other differences?

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. That's all.

Q. On the same price list I find itemized Single Jamb Type garage hardware. What kind of hardware was that?      A. Single Jamb Type?

Q. Single Jamb Type garage hardware for doors up to nine feet.

A. That was the same as the other, as the standard jamb hardware, with cast brackets, and so forth.

Q. And that is illustrated by which of the pieces of literature?

A. There is no illustration of that. However, that hardware looks like this (indicating).

Q. And you are now referring to Defendants' Exhibit 1?      A. Yes.

Q. Referring now again to Defendants' Exhibit 5, how would you change the head clearance, using that hardware overhead, I believe you call it, on a door?

A. That wouldn't change the headroom on that door.

Q. There is no adjustment on that to change the headroom; is that it?      A. That's right. [40]

Q. Using that kind of hardware, how would you line up the door, so that it would be perfectly straight up and down vertically when it is hung?

A. I don't believe I know what you mean.

Q. When you hang a door, if I may volunteer here, if you want the door to hang perfectly vertical—is that right?      A. Yes.

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. What do you do to make it vertical when you use that hardware there?

A. You don't want it to be in or out at the bottom.

Q. That is what was earlier referred to as the "guide arm," I believe that is what you meant by that?

A. Yes. That is the only adjustment on that set of hardware. There is only one adjustment made on any set.

Q. And when you say that is where you fastened the cantilever arm, where you fastened it where?

A. There is only one end loose. There is only one end you can fasten.

Q. How do you do that with the "Econo Jamb" of Exhibit 3?

A. A two-piece cantilever arm is fastened after the hardware is installed, and that holds it in correct position.

Q. You mean, then, that the adjustment of the two pieces of the cantilever arm adjusts the door for vertical position? [41]

A. That's right.

Q. And adjusts the overhead clearance?

A. No. That has nothing to do with the overhead clearance. Possibly a half inch, but that isn't the purpose of it.

Q. Who printed this price list Exhibit 6, Mr. Fowler?

A. It would either be Miller or Cardinal. I believe it was Miller.



Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Did you ever use any other printers for literature of this general nature since 1942, let us say?      A. Yes. We used Christensen.

Q. Was that the full name?

A. Christensen Printers I believe is the full name.

Q. Do you know where he is located?

A. If I remember correctly, it is on 54th, near Western.

Q. I don't remember, Mr. Fowler, whether you gave us the location of Miller or not?

A. Mr. Miller, I believe he is located in the United Artists' Building—Loew's State Building—I am sorry.

Q. And Cradinal?      A. I don't know.

Q. Is it in Los Angeles?      A. Yes.

Q. Was it "Cardinal Printers"? [42]

A. Cardinal Lithograph.

Mr. Fulwider: That is 2875 West Ninth Street, Los Angeles.

Q. (By Mr. Beehler): And those three were the only ones that you recall using as your printers since 1942?

A. Those are the only ones that I recall. However, Miller, you know, he is an advertising agent, and, naturally, he sends the printing out. He doesn't do it himself. But he handles the job.

Q. Miller is an advertising agent, and "Cardinal Lithograph" are printers?      A. Yes.

Q. And Christensens are printers?

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. Yes.

Q. Who else handles your advertising or printing?  
A. Carvel Morse.

Q. And his address?

A. I can give you his phone number.

Q. Yes. What is it? A. Arizona 29330.

Q. Arizona 29330? A. Yes.

Q. Has anyone else handled your advertising since 1942?  
A. No—and Miller.

Q. "W. H. Steele Co.," I find their name stamped on [43] this price list, Exhibit 6. Their address is given as 443 South San Pedro Street. Were they one of your jobbers, if you know?

A. They were representatives.

Q. They were representatives? A. Yes.

Q. What is the character of the business of a representative?

A. They make calls on the jobbers and dealers; they are manufacturers' representatives.

Q. How long have they represented you in that capacity?

A. I believe W. H. Steele represented us in 1945.

Q. Is W. H. Steele an individual?

A. No. It is owned by Allen M. Olds.

Q. Who do you do business with over there?

A. Allen Olds—well, Mr. McAloney.

Q. Can you spell "McAloney" for me?

A. No—McAloney and Olds.

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. They are still located on South San Pedro, 443?

A. I believe they are on Central now. I don't know the address.

Q. I asked you, I believe, before, whether you had tried, in making your door hardware, using a slot in the main plate, or, alternately, two or three holes, and you answered, I believe, that the slot was maybe not practical, [44] and you didn't talk too much about the holes. Tell me, by the use of—well, let's take them one at a time—by the use of a slot in the plate to change the location of the attachment of the lever arm at that end, can you change the vertical adjustment of the hang of the door? You can, can't you?

A. Golly, in order to answer that I have got to tell you more about it.

Q. Well, go ahead.

A. That slot in the bracket is used only when the cantilever arm is fastened to the door support.

Q. That is only used when the cantilever is fastened to the door support, with the angle iron on the door?

A. Yes. You do adjust it when the cantilever arm is fastened to the door support.

Q. Then if you had a slot you could adjust the vertical position of the door?

A. Only if the cantilever arm is fastened to the door support. It wouldn't mean anything otherwise.

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Fulwider: That would be adjusted at either end, as I get it? A. Yes.

Q. (By Mr. Beehler): Then, by using holes you could change it, too, within the limits of the location of the holes? A. That's right. [45]

Q. You said earlier, I believe, Mr. Fowler, that when you sold the Fowler Jamb hardware you used the name "Sturdee," and I take it also you used these other names, "Econo Jamb" and "Deluxe Jamb" and "Lo-Head"; is that correct?

A. Yes.

Q. Do you also designate those items of hardware with any model numbers, any catalog numbers, to identify them?

A. Yes. They are on the price sheets.

Q. Do you have a current price sheet with you?

A. You have. I haven't.

Q. You refer, then, to this Exhibit 6?

A. No. You have another one.

Mr. Fulwider: That is correct. You had an earlier one, I think.

The Witness: Earlier.

Q. (By Mr. Beehler): Are there any model numbers on here? A. I believe so.

Q. Referring to Defendants' Exhibit 4?

A. Yes,—right there (indicating).

Mr. Beehler: The witness indicates the numbers beneath the names "Econo Jamb" and "Deluxe" on Exhibit 4. Do you use any other model numbers when you sell to specific customers?



## Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. No. [46]

Q. Do you ever use the model number "V1-8," in selling Vimcar?      A. No.

Q. You did sell jamb hardware, did you not, to Vimcar Sales?

A. Pardon me—Vimcar—oh, pardon me.

Q. Would you like to correct a statement?

A. Yes, I would. I used their own model numbers and identification on the hardware. I never used the "Sturdee" number, any of our identification model numbers, or anything connected with Sturdee.

Q. Did you ever sell to Vimcar any standard jamb hardware comparable to that pictured in Exhibit 1?

A. If I sold them eight- and nine-foot sets, I did. I don't remember if I sold them commercial hardware or not.

Q. Do you know what the designation "V1-8" means?

A. "V1-8," I think, means a single, with 8-inch headroom.

Q. Would that, then, be a standard jamb hardware item?      A. Yes.

Q. Extended?

A. I don't know what you are referring to—that went on any door?

Q. Well, V1-8 is what is their model number?

A. Yes. [47]

Q. For hardware supplied by you?

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. Yes. That is equivalent to our Econo Jamb Single.

Q. And V2-8, what would that mean?

A. I believe that would mean the double.

Q. V1-3, what would that mean, if you know?

A. Unless it means the Lo-Head. That is probably what it is.

Q. Lo-Head?           A. Yes.

Q. And that is the Lo-Head of what design?

A. I wouldn't know that at this time.

Mr. Fulwider: I think he is talking about the Vimcar marking at the time he was selling it.

A. That would be my Econo Lo-Head.

Q. (By Mr. Beehler): When you were engaged in supplying these jamb hardware items to Vimcar, did you supply them at the same time with drawings and specifications?

A. Drawings and specifications?

Q. Drawings or specifications?           A. No.

Q. Did you supply them with photographs?

A. Yes.

Q. Did you supply them with printed literature?

A. Yes, I believe I did.

Q. Are you familiar with the "Tavart" jamb hardware? [48]

A. Yes, up to a point I know pretty well what it is like.

Q. Do you know whether or not they have an adjustment on it to adjust the door for overhead clearance?

## Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. For overhead clearance—no.

Q. Well, you don't know, or they don't have it?

A. No, they don't have it.

Q. Do you know if they have an adjustment on it to adjust the door for verticality in the jamb?

A. They do.

Q. Is that the same as yours?           A. No.

Q. What is the difference, if you know?

A. They have a slot in the bracket.

Q. When you bought the Tower Company, did you purchase it through an escrow?           A. No.

Q. Was the transaction handled in any bank?

A. No.

Q. Do you have any papers here in connection with that?

A. What has that got to do with the patent? I will answer, though. We do have the bill of sale for it.

Q. May we see it?

A. Well, I don't have it with me.

Mr. Fulwider: There is no reason why you can't see it, [49] if you want to. What date is the document?

The Witness: '42, I believe, or '43, somewhere along there.

Q. (By Mr. Beehler): Did you use any trade magazines for your advertising?

A. I believe we advertised in "Hardware Age" in 1948, '47 or '48.

Q. Any other magazines?

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. That is the only one I remember at this time.

Q. Did you run your ads every month, do you remember?

A. Frankly, I don't remember how that was. It might have been a year's contract, or it might have been by the month. I really don't remember.

Q. You said, Mr. Fowler, that as to the Tavart structure, the way they got the adjustment for verticularity in overhead was by means of a slot in the plate?

A. That's right. This drawing here is somewhat written over.

Q. Is this the relationship of the slots and the plate that you are talking about (handing drawing to the witness)?

Mr. Beehler: The witness referred to Sketch No. 1, in a rectangular area, on a circular entitled "Tavart, the Hardware for All Overhead Doors," on the last sheet of the literature, as showing a plate with a slot in it, to which the cantilever arm is attached; is that correct? [50]

A. That's right.

Q. And that is the means by which this particular hardware achieved an adjustment for verticularity?

A. That's right.

Mr. Beehler: I offer, then, in evidence, unless there is objection, this illustrated literature of "Tavart," as Defendants' Exhibit No. 7.

Mr. Fulwider: No objection.

(Said illustrated sheet was marked Defendants' Exhibit No. 7.)



Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. (By Mr. Beehler): Referring once again, Mr. Fowler, to the Econo Jamb, as illustrated in Exhibit 3, do you have here your first sales slip for that Econo Jamb item?

A. No. I am just trying to think how I could define the first set of that hardware.

Mr. Fulwider: He is asking about sales records. You have got 1948 and '49.

A. Yes, but I don't know how you would define that particular type of hardware in the sales records. It is here, if you can pick it out.

Q. (By Mr. Beehler): Can you pick it out?

A. No.

Q. How are your records set up to distinguish between items of hardware?

A. It refers to the name and the size. However, we did not change the number system and parts system we have now. [51]

Q. In 1948, let's say, what name did you sell the items under which correspond to the patent in suit?

A. "Econo Jamb."

Mr. Fulwider: I think the witness previously testified that the first sales of the jamb of the arrangement shown in this catalog here were in 1949.

Q. (By Mr. Beehler): Is that correct?

A. That is correct. You asked me when—what was your question, again?

Q. I have forgotten. What I am trying to get at is, what name you used in the books which will lead us to determine what your records show as to

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

the first sale of a commercial item which corresponds to the patent in suit?

A. There just isn't a way.

Mr. Fulwider: I think "Econo" and "Deluxe." You never called the hardware you made according to the patent anything else, did you?

A. That's right. But we called a previous set "Econo."

Q. (By Mr. Beehler): May we see your books?

A. Yes. That is what I brought them down here for.

Q. Without following all through them, can you point out here where, in these records, they start telling about the Econo Jamb?

A. Well, sir—

Mr. Fulwider: I think "Econo" turns up first in the [52] January sales for 1949.

Mr. Beehler: In the January sales for 1949?

Mr. Fulwider: Yes.

Q. (By Mr. Beehler): Under purchasers of the Lo-Head, I find Billheimer & Walker. Do you recall them?

A. No, I don't. Billheimer & Walker, you say?

Q. Billheimer & Walker. A. No.

Q. Will you, Mr. Fowler, go back with your counsel on the sales records, perhaps over the lunch hour, and get us the names of the purchasers of the Lo-Head in about 1946, or as early as you can?

A. Sure.

Q. With respect to Lo-Head type door jambs,

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

did you make all those parts yourself, or did you have some of them made for you by other people?

A. Maybe screw machine parts. Screw machine parts were made outside. Everything else was made by us.

Q. Do you have any license to manufacture elsewhere than in California? A. No.

Q. At one time, because of your manufacturing of the jamb type hardware, you made the plates by the use of a casting attached to an angle iron; is that correct?

A. A casting attached to an angle iron?

Q. Yes. [53]

A. You mean the jamb bracket?

Q. The jamb bracket. A. No.

Q. You did not?

A. No. If I understand you correctly, a casting bolted to an angle iron, the two parts together make a jamb bracket?

Q. Yes. A. No.

Q. To complete the record, I show you, Mr. Fowler, a circular bearing the caption, "Sturdee Jamb Hardware for Overhead Garage Doors," a four-page circular, where, on the jamb plate, it is indicated as "Deluxe Jamb." That is a sheet of your literature, is it not? A. Yes, that is.

Mr. Beehler: I offer that in evidence as Defendants' Exhibit 8.

(Said circular was marked Defendants' Exhibit No. 8.)

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. (By Mr. Beehler): Will you examine the back of this circular, Exhibit 8, where you have a picture of the Lo-Head jamb, and tell us what the difference is between the parts of the Lo-Head jamb and the Econo jamb?

A. This is the original Lo-Head that we made, with the boomerang arm and linkage.

Q. Is that comparable, then, to Exhibit 5?

A. That's right. [54]

Q. Does that have the three parts to the control that is presently controlled by the double cantilever arm? A. Yes.

Q. It is correct, then, that the present Lo-Head Jamb is different than this; is that right?

A. Yes.

Q. How does the Lo-Head differ from the illustration on the back of Exhibit 8?

A. It looks the same as the Econo. The only difference is the measurement.

Q. You have just given the name "Lo-Head" to a construction similar to the Econo Jamb, but differing in some measurement, is that right?

A. That's right.

Q. On this Lo-Head Jamb, the picture on the back of Exhibit 8, it looks to me as though there was a slot in the middle of the plate adjacent the point at which the main arm is attached. Is that true, or is that just something that is on the bulletin?



Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. There is none there, but there is no reason for it. I believe this boomerang comes up here and fastens to the top of the cast iron bracket, and this goes down here, and there is a short linkage goes from here over to the boomerang, and that is all you see there. (illustrating).

Q. And that little white thing is a part of the short linkage? [55]

A. Yes, that's right. You can probably check that on another piece of literature. Here it is right here (indicating). Do you see it?

Q. I recall that, yes.           A. Yes.

Mr. Beehler: I have no further questions. We might adjourn, and we can meet again this afternoon for the information he is going to try to get by that time.

Mr. Fulwider: You can probably get that during the lunch hour.

The Witness: I doubt it. We had a fire just a year ago, and we never have really got the records back in shape. But we will be glad to do that.

Mr. Fulwider: Do you have your Department of Employment record of contributions? That will give you the names of the employees at that time.

The Witness: I probably have that. My auditor will know.

Mr. Fulwider: We will do the best we can. We can adjourn to about 1:30. It is 12:30 now. And we will see what we can get, and what we can't get now we can supply you later and let it go in as being testified to by him under oath.

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Beehler: That is satisfactory.

Mr. Fulwider: And then he wouldn't have to be here. He can supply it to you by letter, and the letter would be [56] the best on that.

The Witness: I can do whatever you want.

Mr. Fulwider: He can write you a letter, and we can stipulate that that will be all right.

Mr. Goodman: Or perhaps have the deposition written up and leave blank spaces for the witness to insert the information requested, and let it go in the deposition, and let us have the understanding now as to what that is, for the purpose of this record.

Mr. Fulwider: All right. That's a good idea.

Mr. Beehler: Do you want to make a statement now?

Mr. Goodman: We want the names and addresses of all employees of the plaintiff as of December, 1948, and, second, the names and addresses of all employees in January of 1949, and, third, the names of purchasers of Lo-Head as early as the Lo-Head was sold.

Mr. Fulwider: All right.

Mr. Beehler: I will ask just one more question.

Q. (By Mr. Beehler): Do you have any plans or specifications or sketches, other than those you showed us here, of the jamb hardware as illustrated in the patent?

A. Any plans or specifications?

Q. Drawings or specifications.

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. No; no, I haven't.

Q. At all?

A. None at all. You have got the works. [57]

Mr. Beehler: Let's stipulate, if you are willing, Mr. Fulwider, that the deposition may be signed before any Notary Public.

Mr. Fulwider: Yes. I will so stipulate.

/s/ ROSCOE FOWLER.

Subscribed and sworn to before me this 8th day of October, 1951.

[Seal] /s/ EUNICE B. HANSON,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 19, 1955. [58]

State of California,  
County of Los Angeles—ss.

I, C. W. McClain, do hereby certify that I am a Notary Public in and for the County of Los Angeles, State of California, and that the witness in the foregoing deposition named, Roscoe Fowler, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause; that said deposition was taken pursuant to Notice, commencing at 10 o'clock a.m., on Thursday, August 30, 1951, at the office of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles 14,

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

California, and was completed on the same day; that said deposition was written down in shorthand writing by me and was thereafter transcribed into typewriting under my immediate supervision, and that the foregoing 58 pages contain a true and correct transcription of my shorthand notes so taken.

I further certify that during the taking of the foregoing deposition there were eight exhibits marked on behalf of the defendants, which are hereto annexed.

I further certify that it was stipulated by and between counsel that the deposition may be signed before any Notary Public.

I further certify that I have incorporated in the foregoing deposition certain information furnished to me in a letter sent to me at the request of counsel, which letter [59] is hereto annexed.

I further certify that I am not connected by blood or marriage with either of the parties, nor interested, directly or indirectly, in the matter in controversy.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office this 6th day of September, 1951.

[Seal]     /s/ C. W. McCLAIN,  
Notary Public in and for the County of Los Angeles, State of California.

Received in evidence November 8, 1951. [60]





[Endorsed]: No. 13490. United States Court of Appeals for the Ninth Circuit. Roscoe Fowler, Appellant, vs. Vimcar Sales Company, a Corporation, Victor M. Carter and Morris J. Halopoff, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 15, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals

For the Ninth Circuit

Appeal No. 13490

ROSCOE FOWLER,

Appellant,

vs.

VIMCAR SALES COMPANY, VICTOR M.  
CARTER and MORRIS J. HALOPOFF,

Appellees.

STATEMENT OF POINTS ON APPEAL

The points upon which Plaintiff-Appellant will rely on appeal are as follows:

1. The Court erred in holding the patent in suit, No. 2,516, 196, to be invalid.

2. The Court erred in holding that U. S. Patent No. 2,523,207 was a prior invention of the subject matter of the patent in suit.

3. The Court erred in holding that defendants had not competed unfairly with plaintiff.

4. The Court erred in not holding that the defendants conspired among themselves to compete unfairly with plaintiff.

5. The Court erred in dismissing the complaint and in not awarding judgment to plaintiff against each of the defendants for wilful and deliberate patent infringement and unfair competition.

FULWIDER, MATTINGLY &  
BABCOCK, and

ROBERT W. FULWIDER,

By /s/ ROBERT W. FULWIDER,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 4, 1952.